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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, AND LOCAL 449, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC,

Petitioners,

VS.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: November 14, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Does a compensation system by which wage rates were deliberately reduced by an employer solely because jobs were performed by women violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, where there is no violation of the Equal Pay Act because the jobs in question are not substantially the same as jobs performed by men at a higher rate?

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IN THE

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No. 80-

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, AND LOCAL 449, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC,

Petitioners,

VS.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC, and its Local 449 petition for the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit, to review the judgment of that Court, favorable to petitioners, dated October 29, 1980.[1]

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[1] The parties in the court below were: plaintiffs-appellants International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC, International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC, Local 449, Marge Dinnan Brophy, Henrietta Brown, Melvina Cooper, Ann Raho Frazier, Helen Walsh, and defendant-appellee Westinghouse Electric Corporation. The individual plaintiffs are separately represented.

OPINIONS BELOW

The decision of the district court, per Barlow, J., granting respondent's motion for summary judgment on petitioners' claims of discrimination in compensation is not officially reported. It is unofficially reported at 19 FEP Cases 450 (D.N.J. 1979), and appears in Appendix A to this petition. The decision of the district court granting petitioners' motion for entry of final judgment on this claim and certification under Rule 54(b) of the Federal Rules of Civil Procedure, per Fisher, Ch. J., is not officially reported. It is unofficially reported at 19 FEP Cases 1028 (D.N.J. 1979), and appears in Appendix B to this petition. The opinion of the court of appeals reversing the judgment of the district court is not officially reported. It is unofficially reported at 23 FEP Cases 588 (3d Cir., August 1, 1980), and appears in Appendix C to this petition. The decision of the court of appeals denying rehearing and rehearing *en banc,* rendered October 29, 1980, is not reported. It appears in Appendix D to this petition. The order of the court of appeals pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, granting respondent a stay of the mandate until December 28, 1980 to permit the filing of a petition for a writ of certiorari in this court appears in Appendix E to this petition.

JURISDICTION

The judgment of the court of appeals, following denial of rehearing and rehearing *en banc,* was entered on October 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which grants jurisdiction to review cases in the courts of appeals by writ of certiorari upon the petition of any party.

STATUTES INVOLVED

Section 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a):

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(h) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(h):

> (h) Notwithstanding, any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to

be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

Equal Pay Act, 29 U.S.C. § 206(d)(1):

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantify or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

STATEMENT OF THE CASE

A Procedural Statement

This is a sex discrimination case under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. It was filed by petitioners International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC ("IUE"), IUE Local 449 and by five women members of the bargaining unit the unions represent at defendant Westinghouse Electric Corporation's lamp plant in Trenton, New Jersey. The district court had jurisdiction pursuant to 42 U.S.C. § 2000e-5(f)(3).

The Complaint alleged a broad range of discriminatory practices. The district court granted Westinghouse's motion for summary judgment with respect to plaintiffs' allegations of discrimination in compensation, holding that

these allegations failed to state a claim on which relief can be granted under Title VII. The district court held that, because of the so-called Bennett Amendment to Title VII, 42 U.S.C. § 2000e-2(h) (last sentence), the only situation in which sex discrimination in compensation can violate Title VII is when it would also violate the Equal Pay Act of 1963. Because the Equal Pay Act applies only when men and women are performing work that is substantially the same, and because plaintiffs acknowledged that the jobs involved in this case do not meet that criterion, the court held that plaintiffs had not alleged a violation of Title VII. See App. A. Acting pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the district court thereafter found that there was no just reason for delay and directed entry of final judgment on plaintiffs' claims of discrimination in compensation. App. B.[2]

On appeal, a panel of the United States Court of Appeals for the Third Circuit, one judge dissenting, reversed the judgment of the district court. The Court of Appeals held that the Bennett Amendment did not restrict claims of sex discrimination in compensation under Title VII to cases that would be actionable under the Equal Pay Act. App. C. On October 29, 1980, Westinghouse's petition for rehearing and rehearing *en banc* was denied, with one judge noting his dissent. On November 10, 1980, the Court of Appeals granted Westinghouse's motion for a stay of the mandate until December 28, 1980 pending its filing in this Court a petition for a writ of certiorari. In order to permit the Court to review this case simultaneously with *County of Washington* v. *Gunther*, No. 80-249, cert. granted, November 3, 1980, the union plaintiffs have filed this petition for a writ of certiorari pursuant to the provisions of 28 U.S.C. § 1254(1), rather than wait six weeks for Westinghouse to file its petition. Petitioners have also moved for expeditious consideration of this petition.

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[2] The remaining issues in the case were subsequently settled.

B. Factual Statement[3]

Westinghouse's plant in Trenton, New Jersey is engaged in the manufacture of incandescent light bulbs. It is an assembly plant with approximately 400 employees, 80% of whom are women.

The plant was opened in 1917. Prior to February 1, 1965, all of the jobs at the plant were segregated as to sex. There were "male" jobs and "female" jobs, but no jobs in which both men and women worked.[4]

In the late 1930's, Westinghouse adopted and implemented a procedure for establishing a rate structure under which women's jobs were compensated at a rate below their established value to the company, for the specific reason that the jobs were filled by women. The process is described in portions of the company's Industrial Relations Manual, issued on November 1, 1938 and February 1, 1939, which were submitted by the plaintiffs to the district court. C.A. App. 110-162.

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[3] There was no discovery on the compensation discrimination issue in the district court, as Westinghouse declined to respond to discovery until a decision had been rendered on the legal sufficiency of plaintiffs' claim. The factual allegations set forth here were presented to the District Court in the complaint, and in plaintiffs' opposition to defendant's motion to dismiss or for summary judgment, and were considered by both the district court and the court of appeals. "C.A. App. —" citations refer to the printed appendix in the Court of Appeals.

[4] The female jobs were assembly line jobs, "sub-assembly" jobs (which involve the manual assembly of components) and "quality control" jobs (which involve the use of complex instruments to verify the quality of the product coming off the assembly line).

The male jobs included various material handling jobs (lifting and moving materials and products), janitor, forklift operator, warehouseman, machine attendant and craft jobs. The substantial majority of the employees in the plant have always been women.

Initially, all jobs were "point rated" based on the company's appraisal of their inherent value. The Manual specified the factors to be taken into account in the point-rating, and described how each of these factors is to be accorded a numerical weight on an overall scale. Each job was then assigned a "labor grade" in accordance with its point rating. The Manual emphasized that jobs were to be rated and assigned labor grades without regard to whether they were filled by men or by women.

But after the men's and women's jobs were point rated and allocated to labor grades on an equal basis, the Manual instructed plant officials to compensate women's jobs at a lower rate than men's jobs which had received the same point rating and were assigned to the same labor grade:

WAGE RATES FOR WOMEN

> The gradient of the women's wage curve . . . is not the same for women as for men because of the more transient character of the service of the former, the relative shortness of their activity in industry, the differences in environment required, the extra services that must be provided, overtime limitations, extra help needed for the occasional heavy work, and the general sociological factors not requiring discussion herein.
>
> The rate or range for Labor Grades do not coincide with the values on the men's scale. *Basically then, we have another wage curve or Key Sheet for women below and not parallel with the men's curve.*

See C.A. App. 158. (emphasis added). Wage rates for jobs

in the Trenton plant were established in accordance with these directives.[5]

In 1965, the separate labor grades for men and women were eliminated. But rather than simply combining the five women's labor grades with the corresponding five men's labor grades, Westinghouse expanded the number of labor grades from nine to thirteen and accorded men's jobs labor grades in the new scale four grades above those of women's jobs that had been at the corresponding labor grade level before the merger.

Women employees at the Trenton plant are still clus-

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[5] A 1956 "Key Sheet" illustrates the process:

KEY SHEET TRENTON PLANT — MARCH 20, 1956

FEMALE		MALE	
1W	$1.525	1M	$1.66
2W	1.555	2M	1.695
3W	1.585	3M	1.73
4W	1.62	4M	1.77
5W	1.65	5M	1.85
		6M	1.92
		7M	2.00
		8M	2.13
		9M	2.305

C.A. App. 163. The "W" jobs were rated by the company, according to factors selected by the company, as having the same worth as the corresponding "M" jobs, but the jobs were paid less because they were performed by women. In fact, the highest women's rate was lower than the lowest male rate.

tered in the traditional women's jobs.[6] There have, of course, been numerous increases in the rates set in 1939, but these increases have been applied to existing rates on a cents per hour or percentage basis, so that the existing male-female rate disparities were maintained or enlarged. And, while there have been some changes in job content over the years, and some rate adjustments, it is plaintiffs' contention that the changes have not eradicated the wage inequities established by the foregoing system. The question presented is whether these allegations state a violation of Title VII.

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[6] The following Table shows assignments at the Trenton plant as of November 30, 1975:

Westinghouse — Trenton Plant

	Male	Female
LG1	0	6
LG2	0	33
LG3	1	125
LG4	0	18
LG5	21	16
LG6	4	14
LG7	3	0
LG8	2	0
LG9	3	1
LG10	4	0
LG11	0	0
LG12	19	0
LG13	19	0
	76	213

C.A. App. 165. Ths table shows that with a single exception the 183 employees working at Labor Grades 1 through 4 were women. These are the grades into which the women's jobs were placed in 1965. Eighty five percent of the women in the plant are assigned to these jobs. *Id.*

REASONS WHY THE WRIT SHOULD BE GRANTED

1. On November 3, 1980, this Court granted *certiorari* in *County of Washington* v. *Gunther*, No. 80-249. *Gunther*, like this case, involves the question of whether claims of sex discrimination in compensation under Title VII are limited to situations actionable under the Equal Pay Act. In this case, respondent Westinghouse Electric Corporation has informed the court of appeals of its intention to file a petition for a writ of certiorari and has secured a stay of the mandate until December 28, 1980 in order to do so. The International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC and its Local 449, successful parties below, have filed this petition at this time to enable the Court to review the instant case simultaneously with *Gunther*. *Gunther* and this case arise on significantly different facts, and consideration of both cases would, we believe, provide the Court with a broader perspective as to the implications of the legal issue involved, and facilitate the definition of the scope of Title VII in the area of compensation discrimination.

A. *Gunther* is a suit brought on behalf of four female matrons in a county jail. The complaint alleged that the matron job was substantially equal to the male jail guard job, and that the lesser pay for the matron job therefore violated the Equal Pay Act, as well as Title VII. Plaintiffs alleged, alternatively, that even if the jobs were not substantially equal "some of the difference in salary . . . can be attributed to sex discrimination." 623 F.2d 1303, 1308 (9th Cir. 1979).

The district court in *Gunther* found that the male job required more effort and more responsibility than the female job and that, accordingly, the two jobs were not substantially equal within the meaning of the Equal Pay Act. The court held that Title VII, by virtue of the last sentence of Section 703(h)—the so-called Bennett Amendment—permits no further inquiry. See 20 FEP Cases, 783, 791 &

n.7. On appeal, the Ninth Circuit affirmed the trial court's conclusion that the jobs are not substantially equal, but went on to hold that Section 703(h) does not limit sex discrimination in compensation claims under Title VII to practices that would violate the Equal Pay Act. 623 F.2d at 1310-14. On rehearing, the court of appeals acknowledged that a violation of Title VII could not be established solely on the basis of a comparison of the content of jobs that are not substantially equal, but it indicated that such evidence was relevant and, together with additional, unspecified evidence of discrimination, could establish a violation of Title VII. 623 F. 2d 1317, 1321 (9th Cir. 1980). There is no indication in the opinion of the district court in *Gunther* that plaintiffs either alleged or proved intentional discrimination. The court of appeals stated that the "plaintiffs apparently presented evidence of intentional discrimination that was not considered by the district court . . ." *Id.* at 1321, but it did not identify that evidence or specify its legal significance.

In this case, the issue of the legal effect of the Bennett Amendment arises in a totally different factual context. Plaintiffs have not sought to prove that jobs performed by women are substantially equal to jobs performed by men. In fact, plaintiffs do not rely on any comparisons of job content to prove their claim of discrimination. Rather, they allege that Westinghouse has implemented a system by which compensation for dozens of jobs traditionally performed by women throughout the Trenton Plant was reduced below the levels Westinghouse itself established, solely and explicitly on grounds of sex. These two factors—the lack of reliance on job comparison evidence and proof of a system of intentional discrimination—distinguish this case from *Gunther*.

B. The difference between this case and *Gunther* could lead to different results. One of the arguments strenuously asserted by the employers in both cases is that

Congress' decision in 1963 to substitute the word "equal" for "comparable" in the Equal Pay bill demonstrates a purpose to prohibit discrimination cases based on comparisons of jobs that are not substantially equal, and that that purpose is applicable to Title VII, by virtue of general principles of statutory construction, the legislative history of Title VII, or the Bennett Amendment. See, *e.g.*, Petition for a Writ of Certiorari, *County of Washington* v. *Gunther*, pp. 19-23, 25-26. Whether or not, by virtue of these considerations, Title VII is inapplicable to claims based solely on comparison of the content of jobs that are not substantially equal, the question would remain as to the effect of Title VII on cases such as this, which are not based on a comparison of job duties, but on evidence of an intentional system of discrimination. *Gunther* is based on a comparison of job duties and it is unclear if there is evidence of an intent to discriminate. In addressing employer arguments that *no* form of discrimination in compensation is unlawful under Title VII unless men and women are working in substantially equal jobs at different rates of pay, the Court should have before it a case that involves an intentional system of discrimination and not comparisons of job duties.[7]

C. Apart from the Bennett Amendment issue or any implication of Congressional intent derived from the Equal Pay Act, the *Gunther* case and this case necessarily raise the question of how the standards of Title VII liability es-

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[7] In this case, for example, the district court acknowledged that:

> . . . given this Court's decision, an employer could isolate a job category which was traditionally all female, arbitrarily cut the wages of that job class in half for the sole reason that its holder were female, and yet not run afoul of the broad remedial provisions of Title VII . . .
>
> ——a. In such a situation, comparisons of job duties would not be part of plaintiff's case. A Title VII claim of disparate treatment would be based on the difference in treatment and the specific intent to discriminate.

tablished by this Court apply in the area of compensation practices. The Court has held that an employment practice constitutes unlawful discrimination under Title VII, only if the plaintiff establishes the disparate treatment of a protected group, including proof of an intention to discriminate, or the disparate impact of a facially neutral practice that cannot be justified based on the legitimate business needs of the employer. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 355, n.15 (1977).[8] In the absence of proof of intent, there is question as to just how the pay practices challenged by the plaintiffs in *Gunther* would constitute discrimination under Section 703(a). Although in its rehearing opinion, the court of appeals in *Gunther* did suggest that plaintiffs may have adduced evidence of intent that was not considered by the district court, neither the opinions of the court of appeals or the district court give this Court any clue as to what that evidence might be, or whether it would, indeed, satisfy the intent requirement of the disparate treatment analysis. By contrast, in this case, there are clear and explicit allegations of an international system of discrimination, which could provide a specific predicate for this Court's analysis of requisite proof of discrimination in compensation under Section 703(a).

2. The Equal Employment Opportunity Commission participated in this case as *amicus curiae* in support of the plaintiffs in the district court and in the court of appeals. The EEOC Acting General Counsel personally presented

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[8] By contrast, neither proof of an intent to discriminate nor a facially neutral practice with disparate effect is an element of an Equal Pay Act violation. A violation can be established simply on the basis of proof of men and women doing the same job at different rates of pay. See *Corning Glass Works* v. *Brennan*, 471 U.S. 188, 195-97 (1974); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 463-66 (D.C.Cir. 1976), cert. denied, 434 U.S. 1086 (1978); 29 U.S.C. § 260.

argument in the district court in support of Rule 54(b) certification, and the EEOC General Counsel personally presented oral argument to the court of appeals. This unusual participation results from the great significance of this case, which arises in a complex industrial setting and involves a type of discriminatory pay system that affects many thousands of employees in the electrical industry, and in other major industries in our economy. The decision of the important legal question presented should be made with regard to this industrial context, and not solely in the context of one job in a rural jail.

3. Westinghouse has stated its intention to file a petition for a writ of certiorari in this Court, but not until December 28, 1980. Under the normal schedule, a petition filed at the end of December would not come before the Court for its action until some time in February. At that time, *Gunther* will be fully briefed and ready for argument and the Court could not decide to hear and consider this case with *Gunther*, without a substantial delay of the argument in *Gunther*.

Petitioners believe that the question of whether or not this case is heard with *Gunther* is one over which the Court, and not Westinghouse, should have control. It is for this reason that petitioners have determined to precipitate the issue by filing this petition. Petitioners have simultaneously filed a Motion to Expedite consideration of this petition, in which it is suggested that Westinghouse be required to file its response promptly, so that the petition can be acted on by the Court prior to the holiday recess, and so that if the petition is granted the case can be heard and decided with *Gunther*, without undue delay.

CONCLUSION

For the reasons stated, the petition should be granted and this case should be set for hearing with *County of Washington* v. *Gunther*.

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Dated: November 14, 1980

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 75-1870

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, AN UNINCORPORATED ASSOCIATION, ET AL., *Plaintiffs,*

v.

WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION, *Defendant.*

Opinion

(filed February 8, 1979)

BARLOW, Chief Judge.

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I. Background

This is an action seeking relief for various alleged sexually discriminatory practices and policies of the defendant, Westinghouse Electric Corporation, hereinafter "Westing-

house", at its Trenton, New Jersey plant, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (as amended), hereinafter "Title VII". It was originally part of a larger action brought in the Western District of Pennsylvania against Westinghouse which alleged similar discriminatory practices at numerous Westinghouse facilities. Those counts involving defendant's New Jersey plants were severed and transferred to this Court.[1] Another count, involving nearly identical allegations with respect to Westinghouse's Fairmont, West Virginia plant was transferred to the Western District of West Virginia. The plaintiffs in the present action are a certified class of past and present female production, maintenance, and warehouse employees at Westinghouse's Trenton plant, hereinafter "individual plaintiffs",[2] the International Union of Electrical, Radio and Machine Workers, hereinafter "IUE", and Local 449 of the IUE, hereinafter "Local", the collective bargaining agent of the individual plaintiffs. Presently before the Court is the defendant's motion to dismiss under *Fed. R. Civ. P.* 12(b)(6), or, in the alternative, for partial summary judgment under *Fed. R. Civ. P.* 56(d), directed at those portions of the complaint which allege sex based discrimination in the payment of wages.

Plaintiffs' complaint alleges a pervasive scheme of sex based discrimination at Westinghouse's Trenton, New Jersey plant, all in violation of § 703(a) of Title VII, 42 U.S.C.

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[1] The original complaint in this action was Civil Action No. 74-570, filed in the Western District of Pennsylvania on June 12, 1974. On October 28, 1975, Counts II-V of that complaint were severed and transferred to the District of New Jersey with the consent of all parties.

[2] This Court certified the named individual plaintiffs as representatives of a class of all past and present female production, maintenance, and warehouse employees at the Trenton plant on December 13, 1977.

§ 2000e-2(a).[3] It alleges discriminatory practices in compensation, job assignments, transfers and promotions, tenure, job classifications and other terms and conditions of employment growing out of an official company policy dating back to 1938. *See* Complaint ¶ 21. The motion presently before this Court, however, is far narrower than the issues raised by the complaint. It singles out for attack only plaintiffs' allegations of sex based wage discrimination under § 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1).

In pertinent part, Count II of the complaint, relating to Westinghouse's Trenton plant, alleges that Westinghouse:

> willfully and intentionally discriminated against the Plaintiffs . . . in violation of Section 703(a) of Title VII of the Civil Rights Act of 1964 . . . by (a) paying [them] unequal pay in that male employees performing the same or substantially the same work receive higher pay; [and] (b) paying [them] lower rates of pay than would be paid [them] if [their] skill, effort and responsibility were evaluated on the same basis as is used in evaluating work performed by males. . . .

Complaint, Count II, ¶ 33.

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[3] Section 703(a) states:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify his employees, or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Additionally, the plaintiffs charged that Westinghouse violated section 703(a) by:

> paying [them] solely because of [their] sex, at a rate of pay which is lower than the rate of pay of males whose jobs have been evaluated by the Defendant Westinghouse as having the same number of evaluation points based on education, experience, aptitude, effort, responsibility and working conditions required for the job.

Complaint, Count II, ¶ 34.[4]

During the course of discovery, however, plaintiffs conceded that, notwithstanding the allegations of the complaint, they did not intend to prove that "any job performed by women employees require[d] 'equal skill, effort and responsibility and [was] performed under similar working conditions as that of a job performed by male employee". *See, e.g.*, Answers of Plaintiff Marge Brophy to Interrogatories by Defendant, Nos. 10, 12, & 16 (filed July 13, 1977); Transcript of Hearing of May 1, 1977 at 34-35 (remarks of Richard Sobol, Esq., counsel for Plaintiff-Unions). Westinghouse brought this motion in response to plaintiffs' admission.[5]

The question presented for decision by this motion is whether a sex based wage discrimination claim may be maintained under Title VII in the absence of allegations that male and female employees are paid disparate wages

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[4] Examination of ¶¶ 20-21 of Count I of the Complaint reveals that identical allegations were made with regard to defendant's Fairmont, West Virginia plant.

[5] Westinghouse styles its motion as one to dismiss or, in the alternative, for summary judgment. Since resort has been made to matters outside the pleadings to establish that there is no material issue of fact as to the payment of unequal wages for substantially equal work, *see Fed. R. Civ. P.* 12(c), we will treat the motion as one for partial summary judgment pursuant to *Fed. R. Civ. P.* 56(d).

for the performance of equal or substantially equal work. More specifically, the question is whether the Bennett Amendment to § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h)[6] limits sex based wage discrimination claims under Title VII to conduct which would also be actionable under the Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d).[7] The answer to the question is purely a matter of statutory construction.[8]

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[6] See text at n. 17, *infra*, for the text of § 703(h).

[7] Section 3 of the Equal Pay Act states, in pertinent part, that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1).

[8] In their briefs and at oral argument Westinghouse suggested that the doctrine of collateral estoppel provides another ground for granting their motion. It appears that in that portion of the original action transferred to West Virginia, Westinghouse brought an identical motion and the court ruled in its favor. *See IUE v. Westinghouse*, Civ. No. 75-62-f(H), unpublished opinion, at 11-18 (N.D.W.V. Nov. 21, 1977), hereinafter the "West Virginia action". This Court requested supplemental briefs from all parties in order to consider defendant's contentions. After considering these briefs without benefit of additional oral argument, we do not believe that the doctrine of collateral estoppel is properly applicable on these facts.

Without examining all of the requirements of the doctrine, *see Scooper-Dooper Inc. v. Kraftco Corp.*, 494 F.2d 840, 844 (3d Cir.

II. The Merits of Plaintiffs' Title VII Claim

This Court believes that plaintiffs' allegations of sex based wage discrimination, as clarified by plaintiffs' admission that they do not intend to prove that equal or substantially equal work was performed for unequal pay, are insufficient in law and that defendant's motion should, therefore, be granted.

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1),[9] establishes a broad prohibition against discrimination in hiring, discharge, compensation, terms, conditions or privileges of employment based on race, color, religion, sex or national origin. The year before Title VII was enacted, however, Congress directed its attention to one small subset

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1974), it is clear that the issue decided in the West Virginia action is not identical to the issue presently before this Court, notwithstanding the fact that identical questions of law are raised. *See Commissioner v. Sunnen*, 333 U.S. 591, 601-602 (1958). In this case, the job classification and pay scheme used in New Jersey has been challenged under Title VII, whereas the West Virginia action involved a challenge to the scheme in effect in that state. Clearly the two are "separable" as that term is used in *Sunnen*, *supra*, at 601-602.

This decision reflects our hesitancy to apply collateral estoppel to questions of statutory construction. Doing so will not further the goal of economy of scarce judicial resurces which is at the heart of the doctrine, *see Parklane Hosiery Co. v. Shore*, 47 U.S.L.W. 4079, 4080-81 (U.S. Jan. 9, 1979), since the merits of the issue will be decided on motion, without testimony or trial, and at the expense of little more judicial energy than it takes to decide whether collateral estoppel applies in the first instance. Furthermore, the judicial system best resolves such questions by allowing judges to render their considered opinions based upon their independent evaluation of the factors which go into such a decision, allowing the ordinary rules of stare decisis to govern subsequent application of those decisions in later cases. We therefore decline to estop the plaintiffs from relitigating the legal questions raised in this case and turn to the merits.

[9] Cited in n. 3, *supra*.

of this broad spectrum of discriminatory practices and passed the Equal Pay Act of 1963, 29 U.S.C. § 206(d).[10] This act was designed to deal only with wage discrimination based on sex and did so by enunciating the now well known "equal pay for equal work" standard. *See, e.g., Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265-55 (3d. Cir)., *cert. denied*, 398 U.S. 905 (1970). Congress, desiring to limit the scope of judicial intervention into the business place, rejected a version of the bill which enunciated a "comparable work" standard and adopted instead the "equal work" standard.[11] Under the formulation ultimately adopted by Congress, the Equal Pay Act almost takes the form of a strict liability statute such that proof that men and women perform "substantially equal" work requiring "equal skill, effort and responsibility" and "performed under similar working conditions" for unequal pay establishes a violation without regard to the intent of the employer. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 195-97 (1974); *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164 (3d Cir. 1977). The Act, however, provides four affirmative defenses by which an employer can avoid liability notwithstanding proof of unequal pay for substantially equal work.[12]

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[10] Cited in n. 7, *supra*.

[11] H.R. 8898, 87th Cong., 1st Sess. § 4 (1962) and H.R. 10226, 87th Cong., 2d Sess. § 4 (1962) each provided for the payment of equal wages for the performance of "work of comparable character on jobs the performance of which requires comparable skills . . . ." Later, as H.R. 11677, 87th Cong., 2d Sess. (1962), the bill, after considerable debate, was amended on the floor of the House to substitute the "equal work" formula for "comparable work". 108 Cong. Rec. 14771 (1962). A more complete examination of the history of the Equal Pay Act can be found in the Brief in Support of Defendant's Motion to Dismiss, or, in the Alternative, For Summary Judgment, at 8-13.

[12] See n. 7, *supra*, for the text of these four defenses. Their proper application is not at issue in this case.

Returning to 1964 and the passage of Title VII, Congress was faced with the prospect of enacting a broad statute which would cover conduct already regulated by the narrower prohibitions of the Equal Pay Act,[13] and the problem of determining how the two statutes should relate to one another. Congress' answer to this problem, though not necessarily a solution, was the Bennett Amendment, added to § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which states:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of compensation paid or to be paid to employees of such employer *if such differentiation is authorized by the provisions of [the Equal Pay Act]*. (Emphasis added.)

The present controversy revolves around the proper interpretation of this amendment.

Westinghouse, in support of this motion, argues that the Bennett Amendment should be interpreted to incorporate the Equal Pay Act's "equal work" formula into Title VII, making the two prohibitions coextensive.[14] Thus a Title VII plaintiff would be required to show that the conduct complained of violated the equal work standard of the Equal Pay Act in order to establish sex based wage discrimination under Title VII. Under this view, the payment of unequal wages to men and women performing "comparable" but unequal work would violate neither the Equal Pay Act nor Title VII.

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[13] *See* text at 9-12, *infra*.

[14] The two prohibitions would be coextensive only as to the type of conduct prohibited. The two acts have different scopes of coverage, in the sense of employees protected and employers regulated, and provide for different remedies. *See Howard v. Ward City*, 418 F. Supp. 414 (D.N.D. 1976).

Plaintiffs, in opposition to Westinghouse's motion, argue that Congress did not intend to incorporate the entire "equal work" formula of the Equal Pay Act into Title VII, but only the four affirmative defenses. This interpretation would allow plaintiffs to show sex based wage discrimination under Title VII even though no violation of the equal work standard of the Equal Pay Act had occurred. Plaintiffs strenuously argued that Congress could not have intended to allow purposeful sex based wage discrimination, on the pretext of keeping the courts out of the business place, when Congress exhibited little concern for judicial interference in the business place when wage discrimination was based on race, color, religion, or national origin rather than on sex.

Put succinctly, defendant contends that the proper interpretation of the Bennett Amendment requires that any conduct not prohibited by the Equal Pay Act is "authorized" by that act, while the plaintiffs argue that the Equal Pay Act only "authorizes" conduct protected by the four affirmative defenses. To ascertain which of these two views is the correct one, we must examine the relevant legislative history of Title VII, the subsequent administrative interpretations of Title VII, and the cases addressing the issue.

A. *Legislative History of Title VII.*

Briefly set out, the legislative history of Title VII begins with its introduction as H.R. 7152, 88th Cong., 1st Sess., on June 20, 1963. The bill was referred to the House Judiciary Committee and was reported out to the full House on January 31, 1964 with a recommendation that the bill be approved. *See* H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News 2391, 2401-2408. During all of this time the prohibitions of section 703(a) applied only to race, color, religion and national origin. No mention was made of sex. H.R. Rep. No. 914, *supra*. On February 8, 1964 Congressman Smith of Vir-

ginia proposed an amendment to section 703(a) which would include sex among the prohibited bases of discrimination. *See* 110 Cong. Rec. 2484 (1964). The amendment was passed that same day and the entire bill was approved two days later and sent to the Senate without further consideration of the effect of the amendment on the Equal Pay Act.

The bill bypassed the Senate committee system and was presented directly to the full Senate for initial consideration. It was not until this time that concern was first expressed about the relation of the Title VII sex discrimination ban to the Equal Pay Act. Senator Clark, in response to those expressions of concern, submitted a memorandum to the Senate which assured that "the standards of the Equal Pay Act for determining wage discrimination of course are applicable to the comparable situation under Title VII". 110 Cong. Rec. 7212 (1964). Apparently not completely satisfied with this explanation, Senator Bennett introduced his proposed amendment to section 703(h). The proffered amendment was passed with very little debate, but Senator Bennett clearly stated that "the purpose of my amendment is to provide that in the event of conflicts, the provision of the equal pay act shall not be nullified". 110 Cong. Rec. 13647 (1964).[15]

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[15] The complete legislative history of the Bennett Amendment is set forth below:

> Mr. BENNETT. Mr. President, I yield myself 2 minutes.
>
> The PRESIDING OFFICER. The amendment will be stated.
>
> The legislative clerk read as follows:
>
> On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: 'It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid

to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.

The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand, I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

The PRESIDING OFFICER. (Mr. RIBICOFF in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)

The amendment was agreed to.

110 Cong. Rec. 13647 (1964).

Upon consideration of the Senate amendments to the House bill, Congressman Celler was called upon to explain the purpose of the Bennett Amendment. The Congressman stated that the Bennett Amendment "provides that compliance with the Fair Labor Standards Act as amended satisfies the requirements of the title [Title VII] banning discrimination because of sex". 110 Cong. Rec. 15896 (1964).

As is indicated by this brief examination of the legislative history of the sex discrimination provisions of Title VII, it is clear that Congress did not give the fullest possible attention to the extent to which the sex discrimination provisions of Title VII were to be coterminous with those prohibitions against discrimination based on factors other than sex. This Court is of the view, however, that, although the legislative history is not dispositive of the issue, it tends to support defendant's view of the statute more strongly than the view put forth by plaintiffs.[16]

B. *Administrative Interpretations of Title VII.*

Both plaintiffs and defendant argue that their view of the statute is supported by various guidelines issued by the Equal Employment Opportunity Commission [the "Com-

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[16] Plaintiffs stress the fact that Senator Bennett described his amendment as a "technical correction", *see* 110 Cong. Rec. 13647 (1964), and argue that technical corrections do not make drastic changes in the substantive provisions of acts of Congress. *See* Plaintiff Unions' Memorandum in Opposition to Defendant's Motion to Dismiss, at 8. Westinghouse, on the other hand, argues that the amendment was a proper technical correction because it served to confirm Senator Clark's view of the statute, discussed, *supra*, at 10, without benefit of the amendment. *See* Reply Brief in Support of Defendant's Motion to Dismiss, or, in the alternative, for Summary Judgment, at 11. Because of this conflict in interpretations, this Court does not believe the Bennett Amendment's characterization as a "technical correction" to be of particular importance in resolving the issue before us.

mission"].[17] Defendant's view, the view which this Court believes is most strongly supported by the legislative history of Title VII, appears to be supported by at least the initial Commission interpretations of the Bennett Amendment. In 1965 the Commission promulgated guidelines explaining its view of the scope of Title VII. With respect to sex based wage discrimination, the Commission's guideline interpreted section 703(h) to mean that "the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII".[18]

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[17] Although the Commission is not authorized by the Civil Rights Act to promulgate regulations which have the force of law, its expressions of opinion on the statute committed to its care are clearly deserving of consideration by this Court when questions of statutory construction arise. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

[18] 30 Fed. Reg. 14927 (1965). The full text of the guideline, formerly codified at 29 C.F.R. § 1604.7 (1965), stated:

> § 1604.7 Relationship of Title VII to the Equal Pay Act.
>
> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. *Accordingly, the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.* However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.
>
> (b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29

Notwithstanding this apparently clear expression of the correct interpretation of section 703(h), the Commission has since altered its view. In 1972 a new guideline was issued which adopted language apparently adopting the plaintiffs' view of the statute. This guideline, presently in force, states that "by virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII".[19] The new language no longer expressly

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Code of Federal Regulations, Part 800.-119-800.163. Relevant opinions of the Administrator interpreting 'the equal pay for equal work standard' will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

(Emphasis added.)

Subsection (a) makes it clear that it was the Commission's initial view that with respect to sex based wage discrimination, Title VII's only addition to the protection afforded by the Equal Pay Act was in respect to the employees covered by the statute. *See* n. 14, *supra.*

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[19] 29 C.F.R. § 1604.8 (1977). The full text of the guideline reads:

Sec. 1604.8 Relationship of Title VII to the Equal Pay Act.—

(a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is co-extensive with that of the other prohibitions contained in Title VII and is not limited by secton 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour division, Department of Labor, but will not be bound thereby. 29 C.F.R. § 1604.8.

adopts the equal work formula, but neither does it expressly reject that formula.[20]

Although the 1972 guideline does not expressly reject the "equal work" formula, the present position of the Commission, as illustrated by its past decisions, is clearly in line with plaintiffs' position and rejects the "equal work" formula. *See, e.g.,* [1972] Empl. Prac. Guide (CCH) Empl. Prac. Dec. 71-2629, ¶ 6300 at 4539. Additionally, it is presently the position of the Secretary of Labor, who submitted a brief as Amicus Curiae, that section 703(h) does not limit Title VII to the equal work standard of the Equal Pay Act. *See* Memorandum of the Secretary of Labor As Amicus Curiae, at 3.

In determining which of the Commission's two views of section 703(h) we should adopt, this Court is directed by the reasoning employed by the Supreme Court in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976). In *Gilbert,* the Court was faced with nearly the identical dilemma which presently faces this Court—i.e., the weight to be given a 1972 Commission guideline which conflicted with earlier agency rulings on the meaning of Title VII's sex discrimination ban. The persuasiveness of the guidelines, the court stated, should "in a particular case depend upon the thoroughness evident in its consideration, the validity of its

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[20] It is unclear whether the 1972 guidelines actually repeal earlier interpretations of the Commission. 29 C.F.R. § 1604.1(b) states: "To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled." The 1972 guideline is not expressly inconsistent with the 1965 ruling, in that it does not reject the "equal work" formula. Furthermore, the express incorporation of the four affirmative defenses of § 6(d) of the Equal Pay Act, 29 U.S.C. § 206(d), is not inconsistent with the 1965 guidelines. The implication is clear, however, that the Commission's omission of language expressly incorporating the "equal work" formula is intended to show that the Commission now disapproves of that language.

reasoning, its consistency with earlier and later pronouncements and all of those factors which give it power to persuade, if lacking power to control". *Id.* at 142 *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[21]

We conclude, as the Supreme Court concluded in *Gilbert*, that the 1972 guidelines are not persuasive. Although the *Gilbert* case does not enunciate a rule that prior interpretations are to supersede subsequent inconsistent interpretations as the defendant suggests, *see* Brief in Support of Defendant's Motion to Dismiss or, in the Alternative, For Summary Judgment, at 22, it is clear to this Court that the earlier guidelines, under the standards set out in *Gilbert* and *Skidmore, supra,* are entitled to greater deference than the subsequent guidelines. The fact that the 1965 guidelines were issued contemporaneously with Title VII while the intent of the Congress which had created the Commission was clearly impressed upon the minds of the commissioners, *see Udall v. Tallman,* 380 U.S. 1, 16 (1965), coupled with the fact that the 1965 guideline expressly addressed the incorporation of the "equal work" formula, while the 1972 guideline seems to avoid the issue, *see* text at 14 and n. 20, *supra,* leads this Court to conclude that the 1965 guideline more nearly reflects the intent of Congress in enacting the limitation set out in section 703(h).

C. *The Case Law*

Finally, this Court is of the opinion that the cases support the interpretation of section 703(h) urged by Westinghouse. Every case involving a Title VII sex based wage discrimination claim to which this Court's attention has been directed has placed upon the plaintiff the initial

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[21] It should be noted that *Gilbert* dealt not with two inconsistent Commission guidelines, but with an opinion letter and a subsequent inconsistent guideline. *See* 429 U.S. at 142-43.

burden of showing equal work and unequal pay. *E.g., Orr v. MacNeil & Sons,* 511 F.2d 166, 171 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975) ("To establish a case under Title VII it must be proved that . . . there was the performance of equal work for unequal compensation."); *Ammons v. Zia & Co.,* 448 F.2d 117, 120 (10th Cir. 1971) (Aldisert, J.) ("[T]o establish a [Title VII] case one must prove a differential in pay based on sex for performing equal work."); *Molthan v. Temple University,* 442 F. Supp. 448, 455 (E.D. Pa. 1977) ("[A]ny Title VII claim alleging sex based discrimination in salary will fail if the complained of acts do not amount to a violation of the Equal Pay Act."); *Chrapliwy v. Uniroyal, Inc.,* 15 Fair Empl. Prac. Cas. 795, 806 (N.D. Ind. 1977) ("Under [Title VII] the court's initial inquiry is always: Are the jobs held by a male and a female substantially equal?"); *Howard v. Ward City,* 418 F. Supp. 494, 503 (D.N.D. 1976) (same); *Di Salvo v. Chamber of Commerce of Greater Kansas City,* 416 F. Supp. 844, 849 (W.D. Mo. 1976) (The question is "whether defendant discriminated in salary between males and females who performed substantially equal work".); *Erickson v. Lustra Lighting Division of I.T. & T.,* 12 Fair Empl. Prac. Cas. 372, 376 (N.D. Cal. 1974) (Initial question is "whether plaintiff performed work substantially equal to that performed by the men . . . ."). Although plaintiffs attempt to distinguish these cases as being "equal pay type cases" not involving allegations of purposeful discrimination, *see* Plaintiff Unions' Memorandum in Opposition to Defendant's Motion to Dismiss at 18, they fail to support their suggested distinction with authority, holding that allegations of purposeful discrimination eliminate the need to show equal work in order to state a sex based wage discrimination claim upon which relief can be granted under Title VII. Furthermore, none of the cases cited by defendant use any language suggesting that unsuccessful plaintiffs, who had failed to prove equal work, could nevertheless proceed under Title VII on any other basis.

Those cases upon which plaintiffs rely for the proposition that the Bennett Amendment incorporates only the four Equal Pay Act affirmative defenses and not the "equal work" standard, *Laffey v. Northwest Airlines*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), do not hold that a Title VII claim may be stated without a showing of equal work. *Laffey*, for example, superficially supports plaintiffs' position when it states that "a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the equal pay act". 567 F.2d at 446. This statement, however, is in response to an argument not pressed before this Court. In *Laffey*, the defendant had argued that sex based wage discrimination claims were cognizable only under the Equal Pay Act and that Title VII had no applicability unless the employees were not covered by the Equal Pay Act. *See* 567 F.2d at 444-45.[22] The court rejected this argument and then went on to review the district court's finding that the jobs held by male and female employees were "equal", apparently on the assumption that such a finding was necessary to allow plaintiffs any relief. *See id.* at 446, 453-54.

Likewise, the Supreme Court's recent decision in *Manhart, supra*, 435 U.S. 703 does not aid plaintiffs.[23] In *Man-*

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[22] The defendant's purpose in pressing this argument in *Laffey* apparently was to minimize its potential liability. Both Title VII and the Equal Pay Act authorize an award of back pay to redress any violation proved, and under the circumstances of that case the period for which back pay could have been awarded was longer under Title VII than under the Equal Pay Act. *See* 567 F.2d at 458, 466-68.

[23] Plaintiffs actually relied upon the decision of the Court of Appeals for the Ninth Circuit, 553 F.2d 581 (1976), which was affirmed in part and reversed in part by the Supreme Court, 435 U.S. 702, after oral argument was heard in this case.

hart the issue presented was whether a fixed benefit pension plan which required greater employee contributions from women than men violated Title VII. Clearly, the pension benefits were "wages or compensation" under section 703(h) so that the Equal Pay Act applied to the resolution of the issue. 435 U.S. at 712 n. 23. From the outset, however, it had been conceded that men and women performed equal work for unequal pay. What was at issue was whether one of the four affirmative defenses of the Equal Pay Act saved what the defendants conceded would otherwise be a violation. *Id.* at 711-12. The Court found none of the defenses applicable and struck down the plan. *Id.* at 717. In light of the above discussion, we do not believe that *Manhart* is helpful to plaintiffs in this action.

It is therefore this Court's opinion that the case law, as well as the legislative history and prior administrative interpretations of the Commission, all support Westinghouse's contention that the Bennett Amendment incorporated the "equal work" standard of the Equal Pay Act into Title VII. *Accord,* the West Virginia action, *supra,* n. 7, at 17; *Equal Employment Opportunity Commission v. Colby College,* 439 F. Supp. 631 (D. Maine 1977), *vacated and remanded on other grounds,* 47 U.S.L.W. 2417 (1st Cir. Jan. 9, 1979). In *Colby College,* Judge Gignoux stated:

> Both the language of the Bennett Amendment and its legislative history disclose the plain intent of Congress to avoid subjecting employers to two conflicting standards, those of Title VII and those of the then recently enacted Equal Pay Act, and to provide that any possible conflict between the requirements of Title VII and of the Equal Pay Act is to be resolved in favor of the Equal Pay Act.

439 F. Supp. at 634-35.

We believe that our holding is required if we are to effectuate Congress' intent and to refrain from subjecting employers to two potentially conflicting standards regarding sex based wage discrimination.

Before closing this opinion, we would like to briefly comment on plaintiffs' argument that Congress could not conceivably have intended to isolate one form of purposeful discrimination and exempt it from the broad prohibitions of Title VII. They refer to the hypothetical situation whereby, given this Court's decision, an employer could isolate a job category which was traditionally all female, arbitrarily cut the wages of that job class in half for the sole reason that its holders were female, and yet not run afoul of the broad remedial provisions of Title VII. *See* Plaintiff Unions' Memorandum in Opposition to Defendant's Motion to Dismiss at 9. Even assuming that this would in fact be true, such discrimination could not be maintained. Title VII would still prohibit sex discrimination in hiring, firing, promotion, transfer, classification, and terms and conditions of employment, and any attempt to perpetuate the effects of such purposefully discriminatory yet allegedly lawful activities would run afoul of these prohibitions. We therefore do not believe that our decision will have the dire consequences predicted by the plaintiffs.

CONCLUSION

In conclusion, therefore, we have ruled that allegations and proof of unequal pay for unequal, but comparable, work does not state a claim upon which relief can be granted under section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Since plaintiffs have admitted that they cannot prove that the jobs held by men and women for which unequal pay was given were substantially equal and required equal skill, effort and responsibility, and which were performed under similar working conditions, defendant's motion for partial summary judgment must be, and it hereby is, granted.

Defendant will submit an appropriate order.

George H. Barlow
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. 75-1870

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AN Unincorporated Association, ET AL.,

Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION,

Defendant.

Order Granting Defendant's Motion for Partial Summary Judgment
(Filed March 14, 1979)

Defendant Westinghouse Electric Corporation, in accordance with Rules 12(b) and 56 of the Federarl Rules of Civil Procedure, moved the Court to dismiss or, in the alternative, to enter summary judgment on behalf of Defendant with respect to all claims made in Count Two relating to rates of pay, unequal pay or compensation. The plaintiffs opposed the motion. After a hearing and consideration of the record herein, the Court rendered its written Opinion of February 8, 1979, holding that Defendant's motion for summary judgment must be granted.

Accordingly, pursuant to the Court's opinion of February 8, 1979 and since there is no genuine issue of material fact presented, it is the ORDER of this Court that the motion of Defendant for summary judgment with respect to claims regarding discrimination in pay or compensation be, and hereby is, granted.

/s/ _____
George H. Barlow
Chief Judge

Dated: March 14, 1979

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 75-1870

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ET AL., *Plaintiffs,*

v.

WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION, *Defendant.*

Opinion

FISHER, Chief Judge.

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On March 14th, 1979, this Court entered an order granting partial summary judgment in favor of the defendant Westinghouse Electric Company on portions of Count II of the complaint. In so doing, the Court held that plaintiffs could not prove a claim upon which relief could be granted

under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, by alleging and proving intentional sex-based wage discrimination which did not violate the "equal pay for equal work" standard of the Equal Pay Act. 26 U.S.C. § 206. Presently before the Court is plaintiffs' motion to have this ruling certified as a final judgment for purposes of appeal pursuant to *Fed. R. Civ. P.* 54(b). The Equal Employment Opportunity Commission, which has been granted leave to appear and participate as amicus curiae, supports the plaintiffs' motion.

Certification under Rule 54(b) requires, first, that there be multiple claims for relief asserted against a single defendant;[1] second, that one or more but less than all of the claims for relief be finally determined; and, third, that there be no just reason for delaying the appeal. *See Sears Roebuck & Co. v. Mackey,* 351 U.S. 427 (1956); 10 Wright & Miller, *Federal Practice and Procedure:* Civil § 2656. The parties do not dispute that the first two of these three requirements are met. The plaintiffs assert multiple claims for relief against the defendant, and the Court's ruling on the sex-based wage discrimination claim of Count II of the complaint constitutes a final judgment with respect to one of those claims. *See I.U.E. v. Westinghouse Electric Co.,* unpublished opinion, Civ. Action No. 75-62-F (N.D. W.Va. April 28, 1978). *Cf. Liberty Mutual Insurance Co. v. Wetzel,* 424 U.S. 737 (1976). All that remains to be determined, therefore, is whether there is no just reason for delaying the appeal in this matter.

The law in this circuit has long been that certification under Rule 54(b) is the exception rather than the rule, and that final judgment should be entered only in the "infrequent harsh case" as an instrument for the improved ad-

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[1] Orders which finally adjudicate a claim against a single defendant may also be certified as final judgments in suits against multiple defendants. *Fed. R. Civ. P.* 54(b). Since this is not the case here this provision of Rule 54(b) is not relevant.

ministration of justice and not routinely or as an accommodation to counsel. *See Panichella v. Pennsylvania Railroad Co.*, 252 F.2d 452 (3d Cir. 1958). This interpretation of Rule 54(b) was re-affirmed by the Third Circuit Court of Appeals in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), and again in *Curtiss-Wright Corp. v. General Electric Co.*, Nos. 78-2179-2293 (3d Cir. April 17, 1979). The burden is on the party seeking certification to show that this is the infrequent harsh case meriting a favorable exercise of this Court's discretion. *Allis-Chalmers, supra,* 521 F.2d at 365.

The Court's task is to examine those factors which are peculiar to this case in order to determine whether they counterbalance the general judicial policy against piecemeal litigation and appeals. *Allis-Chalmers* provides instructions in the form of a non-exclusive list of five factors to be considered:

> (1) the relationship between the adjudicated and unadjudicated claims;
>
> (2) the possibility that the need for review might or might not be mooted by future developments in the district court;
>
> (3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
>
> (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; and
>
> (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time for trial, frivolity of competing claims, expense and the like.

Allis-Chalmers, supra, at 364. *See also Myers & Watters Co. v. E.I. duPont de Nemours & Co.*, 449 F. Supp. 411 (E.D. Pa. 1978).

Considering these factors in light of the present facts

we note that the fourth factor, which was so important in denying certification in *Allis-Chalmers* and *Curtiss-Wright*, is altogether lacking here. The third factor favors certification because a reviewing court will not be obliged to consider this issue a second time on an appeal after a trial on the remaining claims. Likewise, although the adjudicated and unadjudicated claims are related, in the sense that all are Title VII claims of sex discrimination arising out of the same series of transactions, they are sufficiently distinct to permit certification. The claim sought to be certified is one of statutory construction only, and does not deal with the complicated factual issues at the heart of the unadjudicated claims. These factors, therefore, all seem to favor certification.

Plaintiffs additionally argue that the delay in the appeal of this claim will prejudice their ability to proceed to trial should the ruling be reversed. They argue that the jobs at issue are being phased out, thereby interfering with discovery and proof at a later date. Delay will also cause witnesses to become unavailable, as well as the potential class claimants in subsequent stage II proceedings.

The EEOC, in support of the motion, argues that our decision involved a "novel issue" which is likely to recur.[2] They would like the benefit of a higher court's ruling in order to aid them map out their future actions with respect to such claims.

Westinghouse strenuously opposes the motion. They contend that certification will prejudice them in that they will be forced to litigate in two arenas at one time; that

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[2] Westinghouse takes issue with this contention. Although I believe that the cases support the late Judge Barlow's decision, with the exception of the action involving Westinghouse's Fairmont plant the cases do not squarely decide the issue presented here. Without indicating any lack of conviction as to the correctness of the prior decision, the prior Third Circuit decisions do not appear to be "on all fours" with the factual setting of this case.

the attention and energy of the parties will be diverted from a trial on the remaining claims thus delaying the resolution of the major portion of the case; and that possible settlement will be delayed. They argue that certification should not be granted where the moving party has not demonstrated any hardship or injustice which would be alleviated by an immediate appeal. *See Vasquez v. Ferre,* 410 F. Supp. 1385, 1387 (D.N.J. 1976). An affidavit is submitted rebutting plaintiffs' claim that they will be prejudiced by a delay in the appeal. The rebuttal is based primarily on the argument that plaintiffs' new-found concern for delay is inconsistent with their prior conduct in prosecuting this action.

Although I am mindful that the record reveals that plaintiffs have not been diligent in prosecuting this case, I believe that certification is a proper exercise of discretion. The factors articulated above indicate that the general policy against piecemeal appeals is not vitiated by certifying this claim as a final judgment. Although the fact that this might present a "novel question" is not alone sufficient to justify certification, *see Vasquez, supra,* 410 F. Supp. at 1387, I believe that some solicitude toward the EEOC's position is desirable. Taking these two factors together, I believe that this order should be certified as a final judgment pursuant to *Fed. R. Civ. P.* 54(b). The Court will enter an order to that effect.

Dated: April 30, 1979.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 75-1870

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, AN UNINCORPORATED ASSOCIATION, ET AL., *Plaintiffs*,

v.

WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION, *Defendant*.

Rule 54(b) Certification

CLARKSON S. FISHER, *Chief Judge*, United States District Court, District of New Jersey

Dated and Filed: April 30th, 1979.

With respect to the issue determined by partial summary judgment in favor of defendant on Count II of the complaint pursuant to an opinion, filed February 8, 1979, and order, entered March 14, 1979, it is CERTIFIED, in accordance with Rule 54(b), *Fed. R. Civ. P.*:

(1) That the Court has directed the entry of final judgment in favor of the defendant on the relevant portions of Count II of the complaint; and

(2) That the Court has determined that there is no just reason for delay.

/s/ CLARKSON S. FISHER
Chief Judge
United States District Court
District of New Jersey

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1893 and 79-1894

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 449, an unincorporated association, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 627, an unincorporated association, H. J. ADAMS, GENEVIEVE ARNETT, JOSEPHINE BAKER, MARGE DINNAN BROPHY, HENRIETTA BROWN, DOROTHY M. BURTON, MINNIE CHATMAN, MARY E. COBB, A. CONTENTO, MELVINA COOPER, JEAN CORBIN, NORMA DOYLE, ELEANOR DYE, TANYA FOURSHEE, D. FOWLER, DOROTHY GAINES, MARTHA GANT, MADELINE GIESE, L. M. HARRIS, DOROTHY HAYES, ELEANOR HUNKER, PAULINE LEE, J. LINDENTHAL, OLLIE LITTLE, MADELINE MARTINO, D. P. MASSI, RENA McLEOD, S. McNEIL, PATTI MITCHELL, ROBERTA MOORE, MABEL MORRELL, MILDRED OCIKI, HELEN O'LOUGHLIN, MARY PFISTER, ANN RAHO, R. RAINEAR, P. RUTOWSKI, LORETTA RYAN, J. L. SHELDON, V. VAUGHN, HELEN WALSH, and SHIRLEY WATKINS, on behalf of themselves and on behalf of all persons similarly situated,

v.

WESTINGHOUSE ELECTRIC CORPORATION
a corporation

International Union of Electrical,
Radio and Machine Workers, AFL-CIO,
CLC ("IUE") and Locals 449 and 627,
Appellants in 79-1893

Marge Brophy, Henrietta Brown,
Melvina Cooper, Ann Raho Frazier and
Helen Walsh, on behalf of themselves
and the class they represent,
Appellants in 79-1894

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 75-1870)

Argued: March 20, 1980

Before: SEITZ, *Chief Judge*,
VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed August 1, 1980)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

The plaintiffs in this case brought suit alleging, *inter alia*, that the Westinghouse Electric Corporation (Westinghouse or the company) had set the wage rates lower for those job classifications which were predominantly filled by females than the wage rates for those job classifications which were predominantly filled by males. Plaintiffs claimed that this disparity was attributable to the fact that the company deliberately paid lower wages for those types of work which would be done predominantly by women. They claimed this disparity is in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2 - 2000h-6.[1] The district

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1. This action was originally part of a larger action filed in the Western District of Pennsylvania which alleged similar discriminatory practices at numerous Westinghouse facilities. The counts involving the New Jersey plants were severed and transferred to the District of New Jersey. The allegations relating to the New Jersey plants asserted that Westinghouse had violated Title VII by:

> (a) paying [women] unequal pay in that male employees performing the same or substantially the same work receive higher pay; (b) paying [women] lower rates of pay than would be paid [them] if [their] skill, effort and responsibility were evaluated on the same basis as is used in evaluating work performed by males; and (c) failing to afford [women] the rights of promotion and transfer to better paying jobs on the same basis as males; and (d) otherwise affording [women] unequal compensation, terms, conditions and privileges of employment because of [their] sex.

Count Two, Complaint, ¶32, *reprinted in* App., at 25.

It also alleged that Westinghouse:

> (1) had denied members of the plaintiff class "[t]he opportunity to work and at the same time afforded all male employees a full eight hour shift and in some instances afforded male employees additional overtime work", Count Three, Complaint, ¶44;

court held that Title VII did not prevent sex discrimination in setting wage rates for different categories of jobs unless it could be shown that the jobs, regardless of the reason for their classification, involved equal or substantially equal work. Because the plaintiffs had stated that they did not intend to prove that the jobs predominantly filled by women were the same as the jobs predominantly held by men, the court granted Westinghouse's motion for partial summary judgment. The plaintiffs appealed.

The instant case pushes us to the edge of subtle concepts of statutory construction. It involves sophisticated aspects of personnel policies and job classifications and it rests on a legislative history which is not totally free of ambiguity. Thus, at the outset it is essential that we make clear what is not involved in this case. Westinghouse is not being charged with the type of discrimination where different wages have been paid to men and women who are in the same classification and who perform the same work. For any classification which was predominantly filled by women, Westinghouse paid the same wage to any male who might work within that same classification. The problem here is that Westinghouse allegedly used a system which set the wage rates lower for any classification if the group cov-

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NOTE 1 — *(Continued)*

(2) had denied members of the plaintiff class "the opportunity to work 8 hours per day as did all male employees", Count Four, Complaint ¶49; and

(3) had discriminated against one of the named plaintiffs "by requiring her to stop work thereby depriving her of holiday pay, as well as her regular weekly wages, credited service, and other benefits in that she was only in her sixth month of pregnancy and was able, willing and desirous of continuing to work and had the approval of her personal physician for such work." Count Five, Complaint ¶53.

App., at 25-32

ered within that category was predominantly female. Under the applicable law it is clear that Westinghouse could not create job classifications whereby different wages were paid to one group solely because of considerations of religion, race or national origin.[2] The statutory issue here is whether Congress intended to permit Westinghouse to willfully discriminate against women in a way in which it could not discriminate against blacks or whites, Jews or Gentiles, Protestants or Catholics, Italians or Irishmen, or any other group protected by the Act. Because we hold that this alleged intentional discrimination in formulating classifications of jobs violates Title VII, we will reverse.

I.

Westinghouse's present wage structure, according to the plaintiffs,[3] is derived from a wage structure Westinghouse established in the late 1930's which was described in Westinghouse's Industrial Relations Manual

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2. 42 U.S.C §2000e-2 (emphasis added) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, *or classify* his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. On a motion for summary judgment all factual disputes are resolved against the moving party. We have therefore adopted the plaintiffs' version of the facts in our resolution of this appeal. *See* Adickes v. S. H. Kress and Co., 398 U.S. 144, 158-59 (1970).

Wage Administration, Part 3, section 3 (1939), *reprinted in* Appendix at 110. At that time all of the job classifications at Westinghouse's Trenton, New Jersey plant were allegedly segregated by sex. The "female" jobs included assembly line jobs, sub-assembly jobs and quality control jobs. The "male" jobs included janitor, forklift operator, warehouseman, various material handling jobs, and craft jobs. For simplicity we will refer to those job classifications which are predominantly filled by women as "female" jobs and those filled predominantly by men as "male" jobs. The 1939 manual explains that the company first "point-rated" all of its jobs taking into account the knowledge and training required, and the specific demands and responsibilities of the job. It then assigned each job a numerical value, based on an evaluation of these three factors. Next each job was assigned a "grade" based on its point rating and "keysheets" were developed which set forth the hourly wage for jobs at each labor grade. The plaintiffs contend that the wage rates for female jobs were set lower than the rates for male jobs which had received the same point rating. Indeed, Westinghouse's manual stated, "The rate or range for Labor Grades [for women] do not coincide with the values on the men's scale. Basically then, we have another wage curve or Key Sheet for women *below* and not parallel with the men's curve." *Id.* at 158a (emphasis added).

In 1965 the company established a unitary key sheet in which the grades had no explicit sexual designation. The plaintiffs contend that the new wage scale, which is still in use, embodies the deliberately discriminatory policy of the prior plan. In support of their view, they contend that Westinghouse expanded the number of labor grades from nine to thirteen and generally accorded female jobs labor grades in the new scale below those of male jobs even though these jobs had been at corresponding labor grades before the merger. They also

point to the fact that the vast majority of the women at the Trenton plant are still employed in the female jobs. Their records show employee assignments at the Trenton plant as of November 30, 1975 as follows:

Westinghouse - Trenton Plant

	Male	*Female*
LG1	0	6
LG2	0	33
LG3	1	125
LG4	0	18
LG5	21	16
LG6	4	14
LG7	3	0
LG8	2	0
LG9	3	1
LG10	4	0
LG11	0	0
LG12	19	0
LG13	19	0
	76	213

Brief for Appellants at 10-11. This table shows that with a single exception the 183 employees working at Labor Grades 1 through 4 were women, the grades into which the female jobs were placed in 1965. Thus, eighty five percent of the women working in the plant in 1975 were assigned to these jobs. Although the plaintiffs acknowledge that "there have been some changes in job content over the years, and some rate adjustments," in their view "the changes have not eradicated the wage inequities established by the [1930] system." *Id.* at 10.

The district court held that Title VII had not been violated even if the wage scale had been set in the manner described by the plaintiffs. It reasoned that because of the Bennett Amendment, which is included in section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), sex-based discrimination in compensation violates Title VII only if

it also violates the Equal Pay Act of 1963, 29 U.S.C. §206(d) (Equal Pay Act). The court held that the Equal Pay Act proscribes discriminatory compensation only when it is shown shown that the plaintiff performs the *same* work or substantially the same work of other employees. Since the plaintiffs in this case agreed that their suit did not involve classifications involving the same work or substantially the same work, the district court ruled that the plaintiffs did not have a cause of action under Title VII. *International Union of Electrical Workers v. Westinghouse Electric Corp.*, 19 FEP Cases 450 (D.N.J. 1979) [hereinafter *IUE I*]. The late Judge Barlow, one of our most distinguished trial judges, summarized his holding by stating, "In conclusion, therefore, we have ruled that allegations and proof of unequal pay for unequal, but comparable, work does not state a claim upon which relief can be granted. . . ." *Id.* at 457.

In response to a motion by the plaintiffs, the district court entered final judgment on this claim and certified an order so that it could be appealed pursuant to Rule 54(b), Fed. R. Civ.Proc.[4] *International Union of Electri-*

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4. Fed. R. Civ. Proc. Rule 54(b) provides:

(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

cal Workers v. Westinghouse Electric Corp., 19 FEP Cases 1028 (D.N.J. 1979) [hereinafter *IUE II*].

II.

Because it affects our jurisdiction we asked the parties to brief the question of whether the district court properly certified the judgment pursuant to Rule 54(b). We conclude that the district court did not abuse its discretion when it entered the final order. *See Curtiss-Wright Corp. v. General Electric Corp.*, 48 U.S.L.W. 4422 (S.Ct. Apr. 22, 1980). The district court noted that as a result of the earlier decision, *IUE I*, the claim of sex-based wage discrimination was terminated and the issue would not be raised a second time after a trial on the remaining claims. Noting that the claim was one of statutory construction and did "not deal with the factual issues at the heart of the unadjudicated claims," the court felt the issue was "sufficiently distinct to permit certification." *IUE II*, 19 FEP Cases at 1029-30. The court also took into consideration the fact that the EEOC had argued that the claim involved a " 'novel issue' which is likely to recur." *Id.* at 1029. We agree that these factors weigh in favor of certification and will therefore affirm the entry of the final order.

III.

A.

At the heart of this appeal lies an amendment to Title VII which was introduced by Senator Bennett of Utah in the final days of the passage of the Civil Rights Act of 1964. The Bennett Amendment (the Amendment), which was adopted as introduced by Senator Bennett and included in section 703(h) of Title VII, provides:

> It shall not be an unlawful employment practice under this subchapter for an employer to differentiate

> upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. §2000e-2(h). Section 206(d) of Title 29, the Equal Pay Act of 1963, proscribes sex-based discrimination in compensation for the same or substantially the same work except when the differential is the result of "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[5] The dispute here is about what is meant by the phrase in the Amendment "if such differentiation is authorized by".

This phrase could mean that except for the four limitations of section 206(d), Title VII has as broad a coverage on sex discrimination changes as it does in any other case. Thus, other than the four exceptions of the Equal Pay Act, there is no dilution of sex discrimination coverage in Title VII cases. This argument could be

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5. 29 U.S.C. §206(d) provides in pertinent part:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

called the "broad coverage position," and is asserted by the plaintiffs and the EEOC. On the other hand, the language in the Amendment could be construed to deny sex discrimination cases the "broader coverage" and to limit the prohibition against sex-based discrimination in wages to situations where the employees are performing the same or substantially the same work, in the manner that the Equal Pay Act is limited. This later view is urged by Westinghouse.

We have not found the resolution of this dispute to be a simple one. Our research has not revealed any single document or statement which unambiguously gives the Amendment meaning. Yet, each document we have found pushes us slowly yet firmly to the conclusion that the Bennett Amendment merely incorporates into Title VII the four exceptions outlined in the Equal Pay Act, the "broader coverage position".

B.

At the outset we note that the construction urged by Westinghouse would result in a substantial limitation on the scope of Title VII's power to address the problems of sex-based discrimination in employment.[6] Westinghouse's position would permit employers to discriminate

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6. Section 703(a), 42 U.S.C. §2000e-2(a) provides:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

against women even though they could not pursue similar discriminatory practices against others on account of race, religion or national origin. As an example, it is clear that Title VII prohibits an employer from paying more per hour to welders than plumbers *if* the reason for the employer paying higher wages to the welder is that the majority of the welders are Protestants and that the majority of the plumbers are Catholics. In such a case an employer would be "classify[ing] his employees . . . in [a] way which would deprive any individual of employment opportunities [high wages] . . . because of such individual's . . . religion." 42 U.S.C. §2000e-2(a). While Westinghouse presumably would not challenge the illegality of the scheme outlined above, it asserts that the scheme would be permissible if the reason for the wage disparity is that the majority of welders are men and the majority of plumbers women. The Supreme Court has never ruled on the statutory issue raised in this case, but in dicta in Title VII cases, the Court tends to refer to discrimination on the basis of race, religion, sex, or national origin as they are equally nefarious and equally prohibited. For in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) (emphasis added) (citations omitted), the Supreme Court stated:

> We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, *sex*, or national origin, . . . and ordained that its policy of outlawing such discrimination should have the "highest priority". . . .

In the absence of explicit statutory language or Supreme Court holdings to the contrary, we are hesitant to con-

clude that Title VII would allow discriminatory behavior on the basis of sex, when the same behavior would be prohibited if made on the basis of race, religion or national origin.[7]

C.

We start our inquiry, as all inquiries involving statutory construction should, with the language of the statute. *Lewis v. United States*, 48 U.S.L.W. 4205, 4207 (S.Ct. Feb. 27, 1980). The Bennett Amendment states that differentiations "authorized by" the Equal Pay Act are not unlawful. Normally the term "authorized" is used to describe something that is endorsed or expressly permitted and not, as Westinghouse suggests, something which is merely not prohibited.[8] Thus, the plain language of the Amendment lead us to the conclusion that the Amendment dilutes Title VII only to the extent that it incorporates the four wage differentials expressly endorsed or permitted by the Equal Pay Act.

Westinghouse asserts that other language in section 703(h), of which the Bennett Amendment is a part,

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7. We reject the argument made by amicus Equal Employment Advisory Council that our task is easier because it is clear that Congress wished to discourage courts from becoming involved in "massive job evaluation trial[s]" and Congress therefore limited the scope of Title VII's prohibition against sex discrimination. Since Congress was willing to permit "massive job evaluation trial[s]" if racial, religious or ethnic discrimination was charged, we cannot presume that they would be fearful of such trials involving sex discrimination.

8. Webster's Third New International Dictionary 146-47 (1961) defines "authorize" in the following manner:

> *1a:* to endorse, empower, justify, or permit by or as if by some recognized or proper authority . . .: SANCTION . . . *b* . . . to furnish grounds for: JUSTIFY. 2 . . . to vouch for . . . 3 . . . to give legality or effective force to . . . *4a*: to endow with authority or effective power, warrant, or right: appoint, empower, or warrant regularly, legally, or officially . . . *b*: to grant or allot by proper authority . . .

suggests a contrary interpretation, for this language already provides for three of the four exceptions to the Equal Pay Act.[9] Westinghouse argues that most of the Bennett Amendment would be superfluous if it were limited to the four exceptions, and thus it contends the language of the Act supports its position. We do not agree. We find it more reasonable to conclude that the repetition of the exceptions in the Amendment ensured that the two statutes would be interpreted in the same manner. With the Bennett Amendment the Equal Pay Act exceptions became "applicable to Title VII as well." *General Electric v. Gilbert*, 429 U.S. at 144. (Equal Pay Act provisions on pregnancy benefits are controlling). By making the acts coterminous Congress eliminated the possibility that an employer would be subject to conflicting regulations. Thus, the language is not surplusage.

Westinghouse argues that we should apply the *in pari materia* canon of statutory construction. Under this canon, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of

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9. *Compare* Title VII, 42 U.S.C. §2000e-2(h):

> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit sysem, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, . . .

with the Equal Pay Act, 29 U.S.C. §206(d):

> except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

the priority of enactment.'" *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976), *quoting, Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). We decline to apply this canon, for it is inconsistent with the Supreme Court's caution that remedies for employment discrimination "supplement" each other and should not be construed so as to ignore the differences among them. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 & n. 9 (1974). Further it conflicts with another rule of statutory construction, namely, "where a statute with respect to one subject contains a specific provision, the omission of such provision from a similar statute is significant to show a different intention existed." *Richerson v. Jones*, 551 F.2d 918, 928 (3d Cir. 1977), *quoting, General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 & n. 4 (5th Cir. 1967); *Tooahnippah v. Hickel*, 397 U.S. 598, 606-07 (1970). Thus, we conclude that the plain language of the statute suggests that only the four exceptions of the Equal Pay Act were incorporated as limitations on Title VII.

D.

The legislative materials on the Bennett Amendment are remarkable only for their equivocacy and turbidity. As has oft been noted, sex was added as a protected classification late in the debate on the Civil Rights Act as the result of an amendment proposed by Representative Smith of Virginia. Probably because sex discrimination was not contemplated as part of the original bill, the "legislative history of Title VII's prohibition of sex discrimination is notable for its brevity." *General Electric v. Gilbert*, 429 U.S. at 143. The Bennett Amendment was not part of the Civil Rights Act when it had first passed the House and was sent to the Senate, although the Act at that time included the prohibition against sex discrimination. The Amendment was included later on the floor of the House, after cloture was

adopted, following a very brief colloquy. Only a few legislative materials are available. Some are ambiguous and, as the parties before us have demonstrated, an ingenious and intelligent mind may find support in all of them for either interpretation. After our review, however, we conclude that on balance they show that Congress intended the more limited scope urged by the plaintiffs.

The first discussion of the issue of discrimination in compensation based on sex is presented by Senator Clark, one of the bill's floor managers. In April 1964 he introduced into the Congressional Record a memorandum which included his answers to questions raised by Senator Dirkson about the Civil Rights Act.[10] There he stated: "The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII." 11 Cong. Rec. 7217 (1964).

This passage is ambiguous as it can be interpreted to mean that Title VII is only as broad as the Equal Pay Act. It is, however, equally possible that Senator Clark simply meant that when equal work challenges were made, the Equal Pay Act was controlling and that he was

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10. The passage reads in its entirety:

Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.

Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike Title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.

110 Cong. Rec. 7217 (1964).

not addressing the problem of discrimination of the sort alleged here. The memorandum is not helpful as a guide to interpret the Bennett Amendment, however, for the comment was made on April 4th, and the Bennett Amendment was not introduced until two months later, June 12, 1964. The passage is therefore only helpful to the extent that it suggests that there was some interest in Congress in the interrelationship of the two acts.

The second passage records the colloquy which occurred when Senator Bennett introduced his amendment to the Senate and it was subsequently approved.[11]

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11. The passage reads in its entirety:

Mr. BENNETT. Mr. President, I yield myself 2 minutes.

I call up my amendment No. 1051 and ask that it be read.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act which became effective only yesterday.

By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word "sex" has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflict between the wholesale insertion of the word "sex" in the bill and in the Equal Pay Act.

The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

Introducing the bill, Senator Bennett explained, "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." Senator Dirkson stated in response, "The Fair Labor Standards Act [Equal Pay Act] carries out certain exceptions. All that the pending amendment does is recognize those exceptions, that are carried in the basic act." *Id.* at 13647. The import of these comments is that the Amendment was merely intended to carry forward the exceptions of the Equal Pay Act. In our analysis we give this passage special significance, as this is the only explanation provided to the body which voted on the Amendment.

The third item is Representative Celler's July 2nd explanation to the House of the changes the Senate

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NOTE 11 — *(Continued)*

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

The PRESIDING OFFICER. (Mr. Ribicoff in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)

The amendment was agreed to.

110 Cong. Rec. 13647 (1964).

made in the House bill, including the Bennett Amendment. There he stated, "Second. [The Senate amendment] [p]rovides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex — section 703(b)." *Id.* at 15896. The district court suggested that this showed that Title VII was meant to be no broader than the Equal Pay Act. *IUE I*, 19 FEP Cases at 454. An equally plausible construction is that compliance with the "equal work" requirements of the Equal Pay Act met Title VII's requirement on that issue only. We are persuaded that Representative Celler must have intended the later interpretation since Title VII proscribes a broad range of gender-based discrimination which is not barred by the Equal Pay Act, such as discriminatory promotions, transfers and firing.

Finally, there are two items written after the Civil Rights Act was passed. We view them cautiously as we are mindful of the Supreme Court's warning in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354, n. 39 (1977), that "[t]he views of the members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight." The first is a memorandum introduced into the Congressional Record by Senator Bennett, in June 1965. The final words of the memorandum state explicitly, "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965).[12]

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12. His explanation in full is:

Relation of Title VII to the Equal Pay Act: An Explanation of the Bennett Amendment

Section 703(h) of the Civil Rights Act of 1964 states: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining

The plaintiffs have pointed us to a sentence earlier in the memorandum which states that the Amendment merely refers to the exemption of certain employees from Equal Pay Act coverage and to the four exceptions of the Equal Pay Act. They argue that this shows Senator Bennett felt the Amendment referred only to the exceptions.[13] We cannot agree. The final statement is quite explicit and it does support Westinghouse's view. Nevertheless, we are not persuaded that this passage represents the intent of Congress at the time it passed the Amendment. We note that it differs from Senator Bennett's earlier explanation, which was the explanation relied on by the Congressmen who approved the

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NOTE 12 — *(Continued)*

the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

The amendment speaks in terms of a "differentiation * * * authorized by the provisions of section 6(d) of the Fair Labor Standards Act."

Section 6(d) authorizes two things:

1. Wage differentials on equal jobs made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The amendment therefore means that it is not an unlwful employment practice; (a) to differentiate on the basis of sex in determining the compensation of white collar and other employees who are exempt under the provisions of the Fair Labor Standards Act; or (b) to have different standards of compensation for nonexempt employees where such differentiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.

Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act.

111 Cong. Rec. 13359 (1965).

13. *See* note 12, *supra*, for text of memo.

Amendment. Further, there was very little discussion of this *ex post facto* history at the time it was introduced and it was not voted upon. We agree with the Ninth Circuit's interpretation of the significance of this passage. In *Gunther v. County of Washington*, 22 FEP 1650, 1652 (9th Cir. 1980), *aff'ing upon petition for rehearing*, 602 F.2d 882 (1979), that court stated:

> As the amendment's sponsor, Senator Bennett's understanding of the amendment might have been entitled to some weight if it had been expressed contemporaneously with the passage of the legislation. See Galvan v. Press, 347 U.S. 522, 526-27 (1954). Coming one year after the Bennett Amendment was enacted, however, the statement at best reflects what was on Senator Bennett's mind when he introduced the amendment and is entitled to no weight. See Manhart v. Los Angeles Department of Power and Water, 553 F.2d 581, 589 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978) (discussion occurring "hours" after passage of Bennett Amendment is not part of amendment's legislative history). Either from a legal standpoint or as a practical matter, Senator Bennett's statement cannot express what was on Congress' collective mind when it acted a year earlier. If Senator Bennett's "clarifying" statement has any significance, it must be as evidence that the amendment was ambiguous on its face and that its contemporaneous legislative history was not enlightening.

The second item written after the Act was passed is contained in a 1977 Senate Report on amendments to Title VII.[14] The Senate Committee states, "It is the com-

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14. The Report states in pertinent part:

The Supreme Court seemed to believe, despite apparently contradictory Equal Pay Act regulations, that the discrimination in

mittee's opinion that [an] application of the Bennett amendment which assumes that the provision insulates from Title VII all compensation and fringe benefit programs which do not also violate the Equal Pay Act is not correct". S. Rep. No. 95-311, 95th Cong., 1st Sess. at 7 (1977). We note the report was written in response to a Supreme Court decision interpreting section 703(h) in a manner which the Senate committee thought was contrary to the view of Congress. The earlier legislative history is consistent with the committee's later statement and supports the plaintiffs' position. We, however, have the same difficulty with this passage that we have with Senator Bennett's memorandum. It is *ex post facto*, and it was neither voted upon nor approved by the Congress as a whole. Thus, we do not rely on it.

About the time of the passage of the Bennett Amendment, June 12, 1964, a number of other amendments which would have limited the scope of Title VII, and which would have had a much smaller potential impact on the scope of Title VII's coverage, were rejected by the Senate.[15] Between June 4 and June 17, when the

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NOTE 14 — *(Continued)*

> question in *Gilbert* would be authorized by the Equal Pay Act. See 29 C.F.R. 800.151. It is the committee's opinion that this application of the Bennett amendment which assumes that that provision insulates from Title VII all compensation and fringe benefit programs which do not also violate the Equal Pay Act is not correct; by expressly precluding reliance on section 703(h) in this context, therefore, the committee merely intends to insure that employers may not rely on the Equal Pay Act to prevent the correction of pregnancy discrimination under Title VII.

S. Rep. No. 95-331, 95th Cong., 1st Sess. at 7 (1977).

15. On June 9, the Senate debated and rejected Amendments 606 and 898. 110 Cong. Rec. 13085, 13093 (1964). On June 22, the Senate debated and rejected Amendments 569 and 605. *Id.* at 13492, 13505. On June 12, the Senate debated and rejected Amendments 607 and 962. *Id.* at 13648-52. On June 13, the Senate

Civil Rights Act was approved by the Senate, twenty-three amendments were rejected. Among them was an amendment to permanently restrict Title VII's coverage to establishments with 100 or more employees (No. 606), 110 Cong. Rec. 13093 (1964); Senator Tower's original testing amendment (No. 605), *id.* at 13505; an amendment requiring that Equal Employment Opportunity Commission (EEOC) employees identify themselves when serving as investigators (No. 963); *id.* at 13650; an amendment expressly permitting EEOC employees to give congressional testimony (No. 922), *id.* at 14193, 14196; an amendment prohibiting the EEOC from withholding any evidence, testimony or records from any court or congressional committee (No. 550), *id.* at 13910; and an amendment allowing the EEOC to elect its own chairman and vice chairman, rather than providing for their appointment by the President (No. 846), *id.* at 13945-46. We think that the congressional opposition to these minor amendments suggests that the Bennett Amendment was not intended to limit Title VII's coverage as Westinghouse urges for the Amendment probably would have been more widely disputed and discussed if that was the intent. Again, this evidence is not decisive to our decision, but it supports the plaintiffs' interpretation.

In summary we conclude that the legislative history shows that the Bennett Amendment merely incorporated the four exceptions of the Equal Pay Act into Title VII without otherwise limiting Title VII's coverage.

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debated and rejected Amendment 963. *Id.* at 13650, 13696. On June 15, the Senate debated and rejected Amendments 519 and 547. *Id.* at 13825-26 and 13838. On June 16, the Senate debated and rejected Amendments 550, 846, 855, and 1020. *Id.* at 13910 and 13943-46. On June 17, the Senate debated and rejected Amendments 590, 847, 922, 1021, 1022, 1023 and 1024. *Id.* at 14179, 14182-83, 14186-87, 14191-93, and 14196-97.

E.

The third group of materials we have used to unravel the meaning of the Bennett Amendment are the regulations and rulings of the EEOC, the regulatory body charged with enforcing the Civil Rights Act. The EEOC's regulations, issued in 1972, make it quite explicit that "the prohibitions against discrimination based on sex contained in Title VII is co-extensive with that of the other prohibitions contained in Title VII and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act". 29 C.F.R. §1604.8 (1978).[16]

The district court discounted these regulations because it felt that the regulations were inconsistent with earlier EEOC regulations issued in 1965. It was the district court's view that the 1965 regulations stated that the discriminatory wage sales were impermissible only if the wage scales were also in violation of the Equal Pay Act. 19 FEP Cases 454-56. The court held that earlier regulations were controlling, relying on *General Electric v. Gilbert*.[17] In *Gilbert* the Supreme Court found that the

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16. 29 C.F.R. §1604.8 (1978) provides in full:

Relationship of Title VII to the Equal Pay Act.

(a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of the other prohibitions contained in Title VII and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of Section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

(c) Where such a defense is raised, the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and House Division, Department of Labor, but will not be bound thereby.

17. The 1965 regulations provided:

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act

EEOC's newer regulations covering pregnancy benefits "flatly contradict[ed] the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." 429 U.S. at 142. It held that the newer regulations were therefore not entitled to the deference normally afforded EEOC regulations. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). ("interpretation of the Act by the [EEOC] is entitled to great deference.")

The rule set forth in *General Electric v. Gilbert* is not applicable to these regulations. The 1965 regulations stated that "with respect to situations to which both statutes are applicable . . . the standards of the 'equal pay for equal work' set forth in the Equal Pay Act" are applicable to Title VII. 30 Fed. Reg. 14928 (1965). They do not state that Title VII's scope is no broader than the Equal Pay Act. Indeed, the regulation specifically provides that

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of 1938, 29 U.S.C 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800 119-800.163. Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

30 Fed. Reg. 14928 (1965).

"discrimination in compensation because of sex is co-extensive with that of the other prohibition in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act." *Id.* Second, and most important, the EEOC, in a number of cases decided before the 1972 guidelines were issued, found Title VII applicable to situations where the wage rates for jobs held predominately by women were set lower than the wage rates for jobs held predominantly by men. In these cases the wage rates were lower because the jobs were held predominantly by women and not because of the job requirements. *See, e.g.*, Decision No. 70-112, 1973 EEOC Decisions (CCH) ¶6108 (Sept. 5, 1969); Decision No. 70-695, 1973 EEOC Decisions (CCH) ¶6148 (April 13, 1970). The EEOC's position has been generally consistent and thus the traditional deference which courts give to agency regulations is to be given in this case. *See United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975) (courts will give "considerable weight" to a "consistent and longstanding interpretation by the agency charged with administration of" that statute). Thus, we find that the EEOC regulations also support the plaintiffs' construction.

F.

The caselaw, for the most part, adds little to our inquiry. The Supreme Court's references to the Equal Pay Act in the context of Title VII are inconclusive and only one decision by a Court of Appeals has squarely faced the issue raised in this appeal. In that case, *Gunther v. County of Washington*, the Ninth Circuit held that Title VII was violated when wages for females were intentionally set, on the basis of sex, lower than wages for men who held different jobs. We find the *Gunther* decision to be persuasive and note that that court's interpretation of the Bennett Amendment's legislative history is consist-

ent with our own.[18] The Tenth Circuit in a different factual setting held in *Lemons v. Denver*, 22 FEP Cases 959 (10th Cir. 1980), that Title VII did not prevent sex discrimination in wages for comparable jobs. We note that *Lemons* is distinguishable because the lower court found that the city had not set the wages for women lower than the wages for men on account of their sex. " 'The City draws no distinction between male and female employees.' " 22 FEP Cases at 960 (quoting the district court's findings). The other cases in both the Courts of Appeals, including this circuit, and the district courts are not helpful because the issue raised by this case was not decided and thus only address this issue in dicta.[19]

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18. Although it is not important to our decision, the facts of *Gunther* demonstrate the difficulty with Westinghouse's interpretation. The plaintiffs were female matrons and prison guards who asserted that they were paid lower wages than the male prison guards on account of their sex. Earlier in Dothard v. Rawlinson, 433 U.S. 321 (1977), the Supreme Court had held that sex was a bona fide occupational qualification for the position of a prison guard and therefore women could lawfully, under certain circumstances, be excluded from the positions held by men. Had the Ninth Circuit found that Title VII permitted the alleged wage discrimination, the women may have been left without redress. They could neither sue for higher wages, nor could they try to transfer to the higher paying jobs to escape the alleged discrimination practices of the city.

19. In some of the cases the courts did not reach the issue, but in dicta viewed the Bennett Amendment as being limited to the four exceptions. *E.g.*, Manhart v. City of Los Angeles Dept. of Power & Water, 553 F.2d 581, 587-88, (9th Cir. 1976), *aff'd and rev'd on other grounds*, 435 U.S. 702 (1978); Fitzgerald v. Sirloin Stockade, Inc., 22 FEP Cases 262, 267 (10th Cir. 1980); EEOC v. Aetna Insurance Co., 22 FEP Cases 607, 611 n. 5 (4th Cir. 1980) (Equal Pay Act claim only); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 446 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978). In other cases, the courts stated in dicta that Title VII is limited to equal work challenges. *E.g.*, DiSalvo v. Chamber of Commerce of Greater Kansas City, 568 F.2d 593, 596 (8th Cir. 1978); and Orr v. Frank R. MacNeil & Son, Inc., 511 F.2d 166, 171 (5th Cir. 1975), *cert. denied*, 423 U.S. 865 (1975). As we have noted, the issue has general-

IV.

With the Civil Rights Act of 1964, Congress released a strong and forceful weapon against employment discrimination. To paraphrase the Supreme Court's words: "It would be ironic indeed if [the Equal Pay Act,] a law triggered by a Nation's concern over centuries of [sexual discrimination] and intended to improve the lot of those who had 'been excluded from the American dream for so long' " were to lead to the contraction of their rights under Title VII. *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979), *quoting* Senator Humphrey, 110 Cong. Rec. 6552 (1964). Nothing we have found suggests that this act was to be weakened so as to "authorize" the explicit discrimination in compensation the plaintiffs assert that Westinghouse has practiced. Moreover, we believe that the evidence suggests otherwise.

Accordingly, we will reverse the judgment of the district court and will remand for further proceedings.[20]

NOTE 19 — *(Continued)*
ly not been directly confronted for adjudication on a record similar to the present one. A variety of reasons may explain this. In some instances, the claimant met the equal work claim and there would have been no need to decide any other approach. *E.g.*, Schultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); and Roesel v. Joliet Wrought Washer Co., 596 F.2d 183, 184-86 (7th Cir. 1979); *DiSalvo*, 568 F.2d at 596-97; and *Laffey*, 567 F.2d at 445. In some cases the plaintiff failed to meet the equal work standard and the facts suggest the plaintiff would not have been able to establish facts similar to the facts of this case. *E.g.*, Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); Calage v. University of Tennessee, 544 F.2d 297 (6th Cir. 1977); *Orr*. Finally, in some of the cases the plaintiffs never sought to challenge the equal work standard. *E.g.*, *DiSalvo; Calage; Manhart*.

20. We make no judgment as to whether, on the merits, the plaintiffs will be able to sustain their burden of proof. We rule merely that they must be given the opportunity to present the case to a fact-finder to evaluate their evidence.

VAN DUSEN, *Circuit Judge*, dissenting.

I respectfully dissent. The majority opinion describes a case in which sex-based wage discrimination and liability under §703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) (1976), will be established by evidence that an express policy of sex-based wage discrimination exists at Westinghouse's Trenton facility.[1] If I understood the case to involve only this issue, I would join in the court's order.[2] However, I

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1. The majority's language also describing plaintiffs' claim as a §703(a)(2), §2000e-2(a)(2), "classification" case is inaccurate. The plaintiff's complaint includes five counts. Each count alleges a §703(a)(1), §2000e-2(a)(1), compensation violation. A §703(a)(2) classification violation is nowhere mentioned in the plaintiffs' papers (8a-33a).

2. The majority's belief that Title VII must be read more broadly than the Equal Pay Act in order that certain sex-based wage discrimination not go unremedied is open to question. The Equal Pay Act states:

> "No employer . . . shall discriminate between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ."

The majority implies that an employer, who explicitly states that he is paying a group of his female employees less than he would if they were males, is not liable under the Equal Pay Act so long as no male employees performing substantially equivalent work exist. I believe that the Equal Pay Act does prohibit such sex-based wage discrimination. It is not necessary that every Equal Pay Act violation be established through proof that members of the opposite sex are currently performing equal work for greater pay. Although the typical Equal Pay case involves a claim that men and women are working contemporaneously at the same job for disparate compensation, the courts have also found Equal Pay violations by looking to the wages paid the predecessors or successors of plaintiffs. *Bourque v. Powell Electrical Manufacturing Co.*, 23 E.P.D. ¶30,891 (No. 1247, 5th Cir., May 5, 1980) (violation of Equal Pay Act and Title VII estab-

understand the Union to be asking this court to adopt the position that a plaintiff can prove a claim under Title VII on a sex-based wage discrimination theory through comparisons of the worth of comparable work; that is, through comparisons of the value of different jobs to the wages paid for performing those jobs. Since I believe Congress adopted the Bennett Amendment, which is included in §703(h) of Title VII, 42 U.S.C. §2000e-2(h), to prevent plaintiffs from proving sex-based wage discrimination claims under Title VII with evidence of the worth of comparable work, I dissent.

NOTE 2 — *(Continued)*
lished by comparison with wage of predecessor and statements of intent to engage in sex-based wage discrimination), and *DiSalvo v. Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978) (violation of Equal Pay Act and Title VII established by comparison with wage of successor). I interpret an employer's statement, "if my female employees were males, I would pay them more," as an admission that men performing equal work, with the same qualifications, in the same working conditions, would be paid more than the current female employees. This situation is covered by the Equal Pay Act. The hypothetical males referred to by the employer suffice as the better paid employees of the opposite sex required by the statute. To require the female employees to wait until better paid male successors are in fact hired by the employer before bringing a claim would be manifestly unjust. I am confident that Congress did not intend such overt discrimination to go unremedied by the Equal Pay Act. I believe that the majority's reliance on the inability of the Equal Pay Act to accommodate this situation is unjustified.

The only case which I have found addressing this question is *Rinkel v. Assoc. Pipeline Contractors*, 17 F.E.P. cases 224, 226 (D. Alaska 1978). The district court in *Rinkel* concluded that in order to establish liability under the Equal Pay Act it was necessary that a member of the opposite sex actually perform equal work, despite explicit statements of intent to discriminate in wages on the basis of sex by the employer. I do not believe the court adequately considered the policies of the Equal Pay Act in reaching this conclusion and was in error.

I.

As I understand the record in this case, the Union's case can only be proved through evidence of the worth of comparable work. The Union's sole evidence of an express policy of discrimination at the Trenton facility is a statement from 1939. Although the Union acknowledges that there have been changes in the content of the various jobs and adjustments to the pay scales over the last 40 years,[3] they argue that, with comparable work evidence, they can prove that the 1939 policy has been perpetuated. They state that "[j]ob comparisons would play only a limited role in plaintiff's proof — establishing that discriminatory wage reductions for women first instituted by Westinghouse some forty years ago have not been eliminated with the passage of time, and that the present system still embodies intentional discrimination."[4] Although the Union downplays the importance of the comparable work evidence, it is the sole evidence available to them to demonstrate that the discrimination has continued. Thus, the evidence of comparable work will be the central focus of the Union's case.[5]

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3. Brief for appellants at 10.

4. Appellants' Reply Brief at 6.

5. The Union explained its proposed method of proof and the importance of comparable work evidence in response to the defendant's interrogatories, as follows:

> "The low rates for all female jobs — including the few classified above Labor Grade 3 — are not justified by the nature and content of the jobs, but are solely the result of sex discrimination. *Plaintiffs will establish this fact by expert testimony after further discovery and investigation, and it is not possible to describe at this point the comparisons which plaintiffs will make at trial between various jobs. However, examples of job comparisons which plaintiffs would make on the basis of their present knowledge are contained in the answers to Interrogatories Nos. 11-16.*"
>
> (69a, emphasis added.)

Accordingly, the question presented by this case is whether a sex-based wage discrimination claim can be made out under Title VII on the basis of evidence of comparable work. Because I believe the Bennett Amendment attempts to incorporate into Title VII the Equal

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NOTE 5 — *(Continued)*

An example of the job comparisons to be made is set out in answer to Interrogatory No. 12.

> "[O]n the basis of their present knowledge, plaintiffs would compare the Mount Machine Operator and the Janitor jobs in the following terms relevant to their claim that the job of Mount Machine Operator is discriminatorily underpaid:
>
> "A Mount Machine Operator must work at a fast pace feeding flares, coils, wires and exhaust tubing into her machine. This demands great skill and dexterity, especially the coil feeding. The operator must be able to work from a schedule sheet, must notify other personnel of type changes and the anticipated time of changeovers, must keep production records, must analyze and record shrinkage, and must take note of irregularities in the machine's operation and in the materials she receives. The operator must clear jams and remove defective parts with tweezers, relight fires, and do other such maintenance functions. The job entails several other duties: traying the finished mounts, stamping and counting flimsies, cleaning machine parts, pushing bulb hampers to the sealex position, dumping glass particles into a cullet box and pushing the box to the aisle and stocking it for the cullet collector to empty, repairing defective mounts, delivering trayed mounts to the sealex position, obtaining materials, sweeping the work area, etc. Much of this work is heavy; for example, the lifting of heavy boxes of flares and tubes, and the moving of even heavier cullet boxes and bulb hampers. The work is constant, and involves tension and pressure, since the operator must keep up with the machine and the plant's production depends on the operator's ability to keep the machine fed and running, and to identify problems in the operation of the machine as well as defects in the materials which go into the machine and the mounts which come out of it.
>
> "In contrast, the Janitor job involves virtually no skill. Moreover, the janitors can work at a leisurely pace, and often have no duties to perform for substantial periods of time. And of

Pay Act's rejection of the comparable work approach, I conclude the answer to the question is no.[6]

II.

The proper analysis of the question begins with an understanding of Congress' position on comparable work in the Equal Pay Act. It is clear from the legislative history of the 1963 Equal Pay Act amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. §206(d), that Congress rejected the comparable work doctrine at that time. *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1173-76 (3d Cir. 1977). Congress did not want

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course, the performance of the janitors does not have a direct effect on production, unlike the Mount Machine job. Furthermore, for the most part the janitor's work is very light. Janitors have seldom been required to sweep the factory areas (except the warehouse janitor), because this work is done by the operators in the areas. Thus the sweeping done by janitors is generally confined to offices, wash rooms, stairways, cafeteria, etc. The cleaning done by the janitors is of a light nature, requiring little exertion. The same is true of the janitors' duties with respect to emptying cigarette containers, wastepaper baskets, etc. And equipment such as powered sweepers and automatic hand tracks minimize the effort required in the few areas where the work might otherwise be heavy."

(75a-77a)

6. Even if the majority's perception of this case, that it raises only the question of whether sex-based wage discrimination can be proved by way of statements of intentional wage discrimination in the absence of an equal work violation, is correct, the majority's analysis will permit sex-based wage discrimination claims to be brought solely on the basis of evidence of comparable work. By interpreting the Bennett Amendment to refer only to the four exceptions in the Equal Pay Act and by holding that Title VII need not be read *in pari materia* with the Equal Pay Act, the majority has necessarily decided that Title VII's prohibition against sex discrimination in wages is not limited by the Equal Pay Act's equal work requirement. Accordingly, we must confront the comparable work issue in this case.

and "did not authorize the Secretary [of Labor] or the Courts to engage in wholesale reevaluation of any employer's pay structure in order to enforce their own conceptions of economic worth." *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 285 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975). Congress rejected the doctrine at least in part due to the difficulty of ascertaining the worth of comparable work and the difficulty of ascertaining the impact on wages of the supply and demand for labor.[7] The determination of proper wages when equal work did not exist was deemed better left to the market place than to a judicial fact finder.

One year later the same Congress passed the Civil Rights Act of 1964, a broad anti-discrimination statute prohibiting, *inter alia*, sex discrimination in employment. It is a general principal of statutory construction that legislation addressing the same issue be interpreted *in pari materia* if possible. The Supreme Court has held that under this canon, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976), *quoting Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). The canon has elsewhere been defined to mean that:

> "In terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same

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7. The difficulty of ascertaining the proper wage for a job by comparing it to the wage paid for dissimilar work has been well documented. *See Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977), and Lindsay, *Equal Pay for Comparable work: An Economic Analysis of a New Antidiscrimination Doctrine* (1980), published by the Law and Economics Center of the University of Miami.

> subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together."

2A C. Sands, *Sutherland Statutory Construction* §51.02 (4th ed. 1973) (footnotes omitted).

In my opinion, the Equal Pay Act and Title VII should be construed *in pari materia*. They both deal with the same subject matter, sex-based wage discrimination. The Equal Pay Act deals solely with sex-based wage discrimination and was enacted after extensive legislative investigation of the issue. Title VII, by contrast, is general anti-discrimination legislation and was passed without investigation of the specific problem of sex-based wage discrimination. In Title VII there is no express repeal of the equal work requirement of the Equal Pay Act. Rather, the legislative history of Title VII shows an actual intent by the floor leaders of the legislation to avoid conflicts between the two statutes. In fact, Title VII expressly refers to the Equal Pay Act and attempts to harmonize the two statutes through the Bennett Amendment.

Further support for construing the statutes *in pari materia* is found in the EEOC's contemporaneous agency regulation, 29 C.F.R. §1604.7(a) (1965). It expressly stated that "Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable." The current EEOC regulations also include a provision expressly addressing the relationship between Title VII and the Equal Pay Act, 29 C.F.R. §1604.8 (1978). Moreover, every court of appeals which has addressed the question of the applicability of the *in pari materia* canon to the interpretation of these statutes, including a

prior decision of the Third Circuit, has held that the canon does apply. *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *DiSalvo v. Chamber of Commerce*, 568 F.2d 593, 596 (8th Cir. 1978); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 446 (D.C.Cir. 1976); and *Orr v. MacNeill & Sons, Inc.*, 511 F.2d 166, 170 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975). All of these factors lead me to conclude that the canon is applicable to the issue in this case and requires us to interpret Title VII in a fashion consistent with the Equal Pay Act's rejection of the comparable work doctrine.

It is from this foundation that I begin my analysis of the Bennett Amendment. The Bennett Amendment provides as follows:

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid employees of such employer, if such differentiation is authorized by the provisions of [the Equal Pay Act] Section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

This provision was added in response to Congressman Smith's amendment, which included sex in the classifications protected under §703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), from employment discrimination.

As the majority discusses extensively, the dispute in interpreting the Bennett Amendment concerns the meaning of the word "authorized" in the phrase "authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938." The majority notes that the word "authorized" is open to two interpretations. It may refer to the four exceptions expressed in the Equal Pay Act, as the majority concludes, or it may limit the prohibition against sex-based wage discrimination to situa-

tions where the Equal Pay Act is also violated, thus preventing the use of comparable work evidence. A review of the aids to interpretation leads me to the latter conclusion.

A.

Statutory construction begins with an analysis of the language of the statute. *Lewis v. United States*, 48 U.S.L.W. 4205, 4207 (S.Ct. Feb. 27, 1980). The word "authorized" normally describes something that is affirmatively endorsed. However, as Westinghouse argues, an alternative definition is "to permit a thing to be done in the future."[8] I do not believe the common meaning of the word is so clear as to reveal conclusively the correct interpretation of the statute.

Moreover, the majority's definition of "authorized" renders the Bennett Amendment largely redundant, a construction which is to be avoided. *F.A.A. v. Robertson*, 422 U.S. 255, 261 (1975). Section 703(h) of Title VII, §2000e-2(h), contains two sentences. The Bennett Amendment is the second sentence. The first sentence explicitly provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . pursuant to a bona fide seniority or merit system or a system which measures earning by quantity or quality of production. . . ." Nonetheless, the majority views the Bennett Amendment as solely incorporating the following provision under the Equal Pay Act: "[n]o employer . . . shall discriminate . . . [on the basis of wages] . . . except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . ." In light of the first sentence of §703(h), the majority's in-

8. Black's Law Dictionary (4th ed. 1968) at 169.

terpretation makes the Bennett Amendment surplusage. Based on these factors, I believe the statutory language itself is inconclusive.

B.

The second aid to interpretation is the legislative history. Two days after Congressman Smith's amendment to Title VII including sex as a protected classification was adopted, the bill passed the House. The bill bypassed the Senate committee system and was presented to the full Senate for initial consideration. The first discussion of the issue of discrimination in compensation based on sex was presented on April 4, 1964, by Senator Clark, one of the bill's floor managers, in response to questions raised by Senator Dirksen. Senator Clark posed the following question and answer:

> "Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. *They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.*
>
> "Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.*

110 Cong. Rec. 7217 (1964) (emphasis added). As I read the emphasized portions of the question and answer,

they demonstrate an intent to preserve the Equal Pay Act's requirement that proof of equal work be a prerequisite to a sex-based wage discrimination claim under Title VII.

Subsequently, on June 12, 1964, the Bennett Amendment was introduced in the Senate. The colloquy at the time of introduction and adoption is somewhat ambiguous.[9] Senator Bennett summarized the import of his amendment by saying:

> "Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflict between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.
>
> "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified."

110 Cong. Rec. 13647 (1964). This statement is open to different interpretations because Senator Bennett did not specify the provisions of the Equal Pay Act to which he was referring. I believe, however, the most logical interpretation of the statement is that Senator Bennett was referring to the equal work provisions of the Equal Pay Act.[10]

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9. The text of the colloquy at the time of introduction and adoption is set forth at note 11 of the majority opinion.

10. Senator Dirksen's statement, which is relied on by the majority, is also ambiguous. Senator Dirksen said, "all that the pending amendment does is recognize those exceptions, that are carried in the basic act." It is unclear what "the basic act" refers to. Moreover, it was Senator Dirksen who first raised the objection, answered by Senator Clark, that Title VII would reject the equal work requirement. These facts leave the majority's interpretation open to question.

The Senate's amendment was then sent to the House for approval. In the House Congressman Celler, floor leader of the bill, explained that the Bennett Amendment "provides that compliance with the Fair Labor Standards Act as amended satisfies the requirements of the title [Title VII] banning discrimination because of sex." 110 Cong. Rec. 15896 (1964). As the majority notes, this statement also is open to varying interpretations. Again, I believe that the most logical interpretation of this remark is that complying with the Equal Pay Act would preclude liability under Title VII for all sex-based wage discrimination claims. The House adopted the provision and the bill was eventually enacted into law.

One year later, in 1965, Senator Bennett submitted a memorandum to be published in the Congressional Record clarifying the meaning of his amendment. The final words of the memorandum are that "[s]imply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965).[11] As the majority notes, this statement explicitly supports Westinghouse's view. Although I am aware of the danger of relying on legislative history which is presented after passage of a law, the Supreme Court cases do not dismiss such history as irrelevant. *Haynes v. United States*, 390 U.S. 85, 87 n.4 (1968); *Galvan v. Press*, 347 U.S. 522, 536-27 (1954); and *Sioux Tribe v. United States*, 316 U.S. 317, 329-30 (1942). When the author of a piece of legislation, a short time after its passage, makes a clarifying statement which is not inconsistent with the prior, ambiguous legislative history, I believe the statement should be given

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11. The full text of the statement is set out in the majority opinion at note 12 at p. 21.

weight.[12] In this case it lends support to Westinghouse's interpretation. In sum, when considered in full, I believe the legislative history supports Westinghouse's view.

C.

The third aid to interpretation is the administrative interpretation of the statute by the Equal Employment Opportunity Commission (EEOC), the regulatory body charged with enforcing the Civil Rights Act. The situation before us parallels that presented to the Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976). In *Gilbert* the Supreme Court discounted the weight to be given EEOC's 1972 Title VII regulations addressing pregnancy benefits, because they were inconsistent with EEOC's 1965 regulations on the issue. In this case the EEOC also amended its regulations in 1972. At that time the EEOC omitted the express requirement of proof of equal work articulated in the 1965 regulation concerning the Bennett Amendment.[13] The current regulation is silent concerning the equal pay requirement, and thus sheds little light on the issue presented by this case.[14] Despite this, recent EEOC rulings

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12. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977), is not to the contrary. It states in pertinent part:

> "The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted §703(h) in 1964, unmistakable in this case, that controls."

13. The full text of the two regulations is set forth in the majority opinion at notes 16 and 17 at p. 26.

14. The majority reads 29 C.F.R. §1604.8(a) (1978) as eliminating the equal work requirement. I understand this subsection to address solely the question of which employees are covered under Title VII and the Equal Pay Act. Title VII protects some workers not protected by the Equal Pay Act. Section 1604.8(a) merely says that the Bennett Amendment does not serve to limit the coverage of Title VII to those employees covered by the Equal Pay Act.

and the amicus brief filed in this court demonstrate that the EEOC currently supports the Union's position that the Bennett Amendment does not incorporate the equal work requirement into Title VII. The prior regulation, however, clearly supported Westinghouse's position. The 1965 regulation stated in part that, "the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." 29 C.F.R. §1604.7(a) (1965). This regulation shows that in 1965 the EEOC believed that the Bennett Amendment incorporated the equal work requirement into Title VII. Although the recent rulings may stand as some authority for the Union's position, in light of *Gilbert*, at 143, I believe their weight is substantially reduced, and that this 1965 regulation should be considered.

D

The case law is the last aid to interpretation. It has been reviewed extensively by both the majority and the district court, *International Union of Electrical Workers v. Westinghouse Electric Co.*, 19 F.E.P. Cases 450 (D.N.J. 1979). Their reviews demonstrate that there is a conflict between the circuits on the issue currently in controversy. Until the decision in *Gunther v. County of Washington*, 602 F.2d 882 (9th Cir. 1978), *aff'd upon petition for rehearing*, No. 76-3448 (9th Cir., May 1, 1980), no court of appeals had held that a Title VII claim of sex-based wage discrimination could be made out without proof of equal work. The opposite position had uniformly been taken. *Lemons v. Denver*, 22 F.E.P. Cases 959 (10th Cir. 1980); *Orr v. MacNeill & Sons, Inc.*, 511 F.2d 166, 171 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117, 120 (10th Cir. 1971) (Aldisert, J., sitting by designation); and *Keyes v. Lenoir Rhyne College*, 15 F.E.P. Cases 914

(W.D.N.C. 1976), *aff'd*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977). Although the *Gunther* opinion treats the problem in more detail than the other cases, it fails to discuss the application of the *in pari materia* canon of statutory construction to the issue. This failure undermines the force of the Ninth Circuit's analysis. In light of this review, I consider the case law another factor in support of Westinghouse's interpretation.

In sum, I believe that when all the aids to interpretation are considered and when the canon of *in pari materia* is given proper weight, Westinghouse's interpretation of the Bennett Amendment must prevail.[15]

III.

In conclusion, I note that read together, Title VII and the Equal Pay Act provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act assures that men and women performing the same work will be paid equally. This approach provides a mechanism for eliminating sex-based wage discrimination, while, at the same time, assuring that the courts and federal agencies will not become entangled in adjudicating the wage rates to be paid for dissimilar jobs — a process in whch they have little expertise. The majority's opinion rejects this balanced approach and will allow claims based on

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15. The majority holds that the *in pari materia* canon is inapplicable to the case at bar. I believe this view leads it to interpret the Bennett Amendment incorrectly. However, even if the majority's limited interpretation of the Bennett Amendment is correct, I believe the *in pari materia* canon compels us to interpret Title VII to include an equal work requirement in sex-based wage discrimination claims, since the Congress in Title VII did not expressly reject the equal work requirement.

the valuation of comparable work. Although the majority's opinion is purportedly limited to cases involving express statements of discrimination, its analysis is not so limited. In order to find a sex-based wage discrimination cause of action under Title VII where one does not exist under the Equal Pay Act, the majority has interpreted the Bennett Amendment to refer only to the four exceptions in the Equal Pay Act and, by not following the canon of *in pari materia*, has rejected the applicability of the policies of the Equal Pay Act to Title VII. Having disposed of both of these limitations on the scope of Title VII, this court has no basis under which to exclude evidence of the worth of comparable work in a Title VII sex-based wage discrimination case.[16] I do not believe Congress intended to overrule the equal work policy of the Equal Pay Act in adopting Title VII, and accordingly I dissent.[17] I would affirm the district court's order.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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16. As noted above in part I, I believe this is such a case.

17. My analysis of the limitation of Title VII in the area of sex-based wage discrimination in no way implies that I am unsympathetic to the employment discrimination suffered by many women. While I view such discrimination as a deep-rooted social problem which can and should be remedied, I think the change must come from the legislature. My review of the legislative history convinces me that in passing the Civil Rights Act of 1964 the 88th Congress did not intend to subject employers to liability on claims based on the valuation of comparable work. In light of the still great disparities between the wages of men and women 16 years after the enactment of the Civil Rights Act, Congress may now wish to pass legislation allowing comparable work claims to be brought under Title VII.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Nos. 79-1893 and 79-1894

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ET AL., *Plaintiffs*,

v.

WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION *Defendant.*

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC ("IUE") AND LOCALS 449 AND 627, *Appellants* IN 79-1893

MARGE BROPHY, HENRIETTA BROWN, MELVINA COOPER, ANN RAHO FRAZIER AND HELEN WALSH, ON BEHALF OF THEMSELVES AND THE CLASS THEY REPRESENT, *Appellants* IN 79-1894

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM AND SLOVITER, *Circuit Judges.*

The petition for rehearing filed by WESTINGHOUSE ELECTRIC CORPORATION in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing.

BY THE COURT,

/s/ A. Leon Higginbotham
Circuit Judge

Dated: October 29, 1980

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1893/4

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ETC., ET AL.

vs.

WESTINGHOUSE ELECTRIC CORP., ETC.
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC ("IUE") AND IUE LOCALS 449 AND 627,
Appellants in No. 79-1893

MARGE BROPHY, HENRIETTA BROWN, MELVINA COOPER, ANN RAHO FRAZIER and HELEN WALSH, ON BEHALF OF THEMSELVES AND THE CLASS THEY REPRESENT,
Appellants in No. 79-1894

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 28, 1980.

/s/ _____

A. Leon Higgenbotham
Circuit Judge

Dated: November 10, 1980

No. 80-781

DEC 11

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, and LOCAL 449, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC,

Petitioners,

VS.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

RESPONSE BY WESTINGHOUSE ELECTRIC CORPORATION TO THE IUE'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RESPONSE BY WESTINGHOUSE ELECTRIC CORPORATION TO THE IUE'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

In the present case the International Union of Electrical, Radio and Machine Workers (hereinafter the "IUE") has taken the unusual step of filing a Petition For A Writ Of Certiorari (hereinafter the "IUE's Petition") even though it was the party which prevailed in the court below. The IUE's Petition advises that that unusual step was taken because: "In order to permit the Court to review this case simultaneously with *County of Washington v. Gunther,* No. 80-429, *cert. granted,* November 3, 1980, the union plaintiffs have filed this petition for a writ of certiorari . . . rather than wait six weeks for Westinghouse to file its petition [for a writ of certiorari]." IUE's Petition at 5. "It is for this reason that [the IUE] petitioners have determined to precipitate the issue by filing this petition." IUE's Petition at 14.

Westinghouse did not wait six weeks to file its own Petition For Writ Of Certiorari (hereinafter the "Westinghouse Petition"). Rather, on the same date hereof, the Westinghouse Petition has been filed. As counsel for Westinghouse had previously advised the IUE and other courts, the Westinghouse Petition was filed as promptly as practicable in light of said counsel's prior commitments to other cases. In its own Petition, Westinghouse requests that a writ of certiorari be granted to review the decision below and that the case be taken for briefing and oral argument on the merits. This case could be scheduled for argument at the same time as *Gunther*. The briefing schedule herein could be adjusted as deemed appropriate by the Court.

Response by Westinghouse.

Because Westinghouse was the party aggrieved by the decision below and because the denial of a writ of certiorari would be highly detrimental to Westinghouse and would actually be advantageous to the IUE, Westinghouse prepared its own Petition for Writ of Certiorari which contains, in its perception, a more complete presentation of the nature of this litigation than the admittedly more hastily prepared IUE's Petition. That Westinghouse Petition is independent of the IUE's Petition and contains, in its own right, all of the elements required in a petition for a writ of certiorari. In addition, Westinghouse's Petition contains factual and legal material responsive to the various elements and contentions set forth in the IUE's Petition. Accordingly, as part of the instant Response By Westinghouse To The IUE's Petition For A Writ Of Certiorari, Westinghouse incorporates by reference herein the material set forth in Westinghouse's Petition.

Moreover, Westinghouse submits that the Court should consider said Westinghouse Petition, filed simultaneously herewith, as the basis for considering the grant of a writ of certiorari for the following reasons:

1. Westinghouse, as the party aggrieved by the decision below, would be the party injured by the denial of a writ of certiorari.

2. Accordingly, the Westinghouse Petition has been made more complete than the IUE's Petition which was filed to "precipitate the issue" for the Court's consideration. IUE's Petition at 14.

3. Thus, the Westinghouse Petition presents a more extensive discussion of the issues that would be involved in the trial of this case (as well as other cases), if the "equal work" standard recognized by

the district court as a basis for summary judgment is disregarded under Title VII of the Civil Rights Act of 1964, as was done by the Third Circuit. We believe that this more complete discussion of the nature of this case, found in the Westinghouse Petition, is a sounder basis upon which to consider and grant a writ of certiorari.

4. Since Westinghouse is the party with the burden of convincing a majority of the Court that the decision below should be reversed, it should have the opportunity to present opening and closing briefs and argument. This would occur if Westinghouse's Petition For Writ Of Certiorari is the one granted by the Court.[1]

5. We respectfully submit that the filing of a petition by the IUE, as a party which entirely prevailed below, is a practice which has unnecessarily complicated the pleadings before this Court and the normal processing of this case.

For all of the above reasons and also for those set forth in Westinghouse's Petition For Writ Of Certiorari,

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1. In this regard, we also note that in the *Gunther* case, the employer is, likewise, the party which will present opening and closing briefs and argument.

we respectfully submit that Westinghouse's Petition For Writ Of Certiorari should be granted and the Petition filed by the IUE should be denied.

Respectfully submitted,

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